

THE GENERAL STATUTES OF NORTH CAROLINA

1987 CUMULATIVE SUPPLEMENT

Annotated, under the Supervision of the Department of
Justice, by the Editorial Staff of the Publishers

Under the Direction of

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Volume 1C, Part I

Chapters 15 to 17E

Annotated through 356 S.E.2d 26. For complete scope of
annotations, see scope of volume page.

**Place Behind Supplement Tab in Binder Volume.
This Supersedes Previous Supplement, Which
May Be Retained for Reference Purposes.**

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Preface

This Cumulative Supplement to Replacement Volume 1C, Part I contains the general laws of a permanent nature enacted by the General Assembly through the 1987 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purpose of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement, and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

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Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1987 Regular Session affecting Chapters 15 through 17E of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 319, p. 464.

North Carolina Court of Appeals Reports through Volume 85, p. 173.

South Eastern Reporter 2nd Series through Volume 356, p. 26.

Federal Reporter 2nd Series through Volume 817, p. 761.

Federal Supplement through Volume 658, p. 304.

Federal Rules Decisions through Volume 115, p. 78.

Bankruptcy Reports through Volume 72, p. 618.

Supreme Court Reporter through Volume 107, p. 2210.

North Carolina Law Review through Volume 65, p. 847.

Wake Forest Law Review through Volume 22, p. 424.

Campbell Law Review through Volume 9, p. 206.

Duke Law Journal through 1987, p. 190.

North Carolina Central Law Journal through Volume 16, p. 222.

Opinions of the Attorney General.

User's Guide

The General Statutes of North Carolina 1987 Cumulative Supplement

VOLUME 1C, Part I

Chapter 15.

Criminal Procedure.

Article 15A.

Investigation of Offenses Involving Abandonment and Nonsupport of Children.

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Sec.

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ARTICLE 1.

General Provisions.

§ 15-1. Statute of limitations for misdemeanors.

Legal Periodicals. —

For survey of 1982 law relating to

criminal law, see 61 N.C.L. Rev. 1060 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Cited in *State v. Brown*, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

§ 15-6. Imprisonment to be in county jail.

OPINIONS OF ATTORNEY GENERAL

This section has two prongs. First, it makes clear the type of facility in which a convicted defendant shall not serve a term of imprisonment, unless permitted under other legislation, and second, it provides that a person may only be sentenced to imprisonment in the county where the crime was committed. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Place of Imprisonment Where Sentence Less than and Greater than 180 Days. — Absent specific statutory authorization (See, e.g., §§ 15A-711, 148-32.1, 162-38 to 162-40), imprisonment of misdemeanants with sentences of 180 days or less must be in the local confinement facility of the county where the crime was committed. If the sentence is greater than 180 days, commitment may be either to such a local facility or to the N.C. Department of Correction. See

opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Section Overridden by § 15A-1352 as to Certain Criminals. — While § 15-6 applies to both felons and misdemeanants, § 15A-1352 overrides § 15-6 to the extent it provides for certain felons and misdemeanants to be sentenced to terms of imprisonment under the jurisdiction of the N.C. Department of Correction. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Effect of § 15A-1352 on Section. — Section 15A-1352 is an exception to § 15-6 as to those misdemeanants with sentences of more than 180 days, because they may be sentenced to serve their term of imprisonment under the jurisdiction of the Department of Correc-

tion, but as to those not placed in the custody of the Department of Correction, the only effect of § 15A-1352 is to broaden the term "common jail" to include other types of local facilities which may be used under appropriate circumstances. See opinion of Attorney General to Mr. Bruce Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

County of Venue Irrelevant in Determining Place of Imprisonment. — Even though the venue of a criminal trial may properly be in a county other than the one in which the crime occurred, to the extent that § 15-6 applies, it requires imprisonment to be in the county jail of the county where the crime occurred. See opinion of Attorney General to Mr. Bruce Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

ARTICLE 4A.

Administrative Search and Inspection Warrants.

§ 15-27.2. Warrants to conduct inspections authorized by law.

CASE NOTES

Basis for Probable Cause. —

Probable cause for an administration inspection warrant may be based on (1) specific evidence of an existing violation or (2) a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment. In order to meet the requirements of the second standard, an applicant for an inspection warrant must show that: (1) There exists a legally authorized inspection program which naturally included the property; (2) that the general administrative enforcement plan is based on reasonable legislative or administrative standards; and (3) that the administrative standards are being applied to the particular establishment on a neutral

basis. *Brooks v. Butler*, 70 N.C. App. 681, 321 S.E.2d 440 (1984), cert. denied and appeal dismissed, 313 N.C. 327, 329 S.E.2d 385 (1985).

Scope and Objects of Search Must Be Included, etc. —

A warrant authorizing inspection of all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials, and all other things is not overbroad. A warrant authorizing a general inspection of an industry naturally contemplates a comprehensive inspection since the location of possible violations is unknown. *Brooks v. Butler*, 70 N.C. App. 681, 321 S.E.2d 440 (1984), cert. denied and appeal dismissed, 313 N.C. 327, 329 S.E.2d 385 (1985).

ARTICLE 13.

Venue.

§ 15-129. In offenses on waters dividing counties.

CASE NOTES

Cited in *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984).

§ 15-131. Assault in this State, death in another.

CASE NOTES

Jurisdiction of County Grand Jury. — Under the law of determining jurisdiction as between states, jurisdiction lies in this state if any of the essential acts forming the crime take place in

this state. This same rationale extends to jurisdiction of the county grand jury to indict. *State v. Vines*, 317 N.C. 242, 345 S.E.2d 169 (1986).

ARTICLE 15.

Indictment.

§ 15-144. Essentials of bill for homicide.

CASE NOTES

Article 1, § 23, N.C. Const., and § 15A-924(a)(5) did not specifically repeal this section, nor did they repeal it by implication. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

Indictment in form prescribed, etc. —

An indictment which complies with the short form indictment authorized by this section is sufficient to charge first degree murder without specifically alleging premeditation and deliberation or felony murder. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

This section contains no requirement that the indictment specify the degree of murder sought. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

Essentials Make No Distinction, etc. —

An indictment which meets the requirements of this section will support a

plea of guilty to or a conviction of either first or second degree murder. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

A prosecutor is not required to determine, before the return of the indictment, whether he will ultimately prosecute a defendant for murder in the first or second degree. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

Applied in *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983); *State v. Brown*, 312 N.C. 237, 321 S.E.2d 856 (1984); *State v. Albert*, 312 N.C. 567, 324 S.E.2d 233 (1985).

Cited in *State v. Hinson*, 310 N.C. 245, 311 S.E.2d 256 (1984); *State v. Ledford*, 315 N.C. 599, 340 S.E.2d 309 (1986); *State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986); *State v. Evangelista*, — N.C. —, 353 S.E.2d 375 (1987).

§ 15-144.1. Essentials of bill for rape.

CASE NOTES

Section Eliminates Requirement, etc. —

In enacting this section, the legislature eliminated the requirement that every element to be proven at trial must be alleged in the indictment. *State v. Walker*, — N.C. App. —, 353 S.E.2d 245 (1987).

When Indictment under this Section Is Constitutional. — An indictment under this section is constitutional if it permits the defendant to prepare a defense and to be protected from subsequent prosecution for the same offense. *State v. Walker*, — N.C. App. —, 353 S.E.2d 245 (1987).

One purpose of an indictment is to give the defendant notice of the charge against him to the end that he may prepare a defense and be in a position to plead double jeopardy if he is again brought to trial for the same offense. Another purpose is to enable the court to know what judgment to pronounce in case of conviction. *State v. Sills*, 311 N.C. 370, 317 S.E.2d 379 (1984).

Allegation as to Age of Victim. — An allegation that the victim was "a female child eight (8) years old" sufficiently alleged that she was "a child under 12" and satisfied the requirement of subsection (b) of this section as it existed on June 6, 1983. *State v. Ollis*, 318 N.C. 370, 348 S.E.2d 777 (1986).

Unnecessary Averments. —

The date given in a bill of indictment usually is not an essential element of the crime charged. The State may prove that the crime was in fact committed on some other date. This rule, however, may not be used to deprive a defendant of his defense. *State v. Sills*, 311 N.C. 370, 317 S.E.2d 379 (1984).

Where the indictments for attempted rape fully complied with the requirements set forth in this section, the indictments were not insufficient merely because neither indictment alleged that the victims of the crimes were females. *State v. Bell*, 311 N.C. 131, 316 S.E.2d 611 (1984).

Sufficiency of Indictment under Sections 15-144.1 and 15-144.2. — The short form indictments set out in this section and § 15-144.2 for first-degree rape and first-degree sexual offense provide adequate notice of the charges.

State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

The provisions of this section do not prevail over § 15-155. *State v. Sills*, 311 N.C. 370, 317 S.E.2d 379 (1984).

Construction with § 15-155 as to, etc. —

In accord with 1st paragraph in original. See *State v. Welch*, 69 N.C. App. 668, 318 S.E.2d 4 (1984).

Bill of Particulars. — The granting of a motion for a bill of particulars lies within the discretion of the trial court and is not subject to review by the appellate courts except for gross abuse of discretion. *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

The denial of a defendant's motion for a bill of particulars will be held error only upon a clear showing that the lack of timely access to the information significantly impaired the defendant's preparation and conduct of his case. *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

A defendant may request a bill of particulars to obtain information to supplement the facts contained in the indictment. *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

Election by State. — By unequivocally arraigning defendant on second-degree rape and by failing thereafter to give any notice whatsoever, prior to the jury being impaneled and jeopardy attaching, of an intent instead to pursue a conviction for first-degree rape as arguably supported by the short-form indictment, the state made a binding election not to pursue the greater degree of the offense, and such election was tantamount to an acquittal of first-degree rape. *State v. Jones*, 317 N.C. 487, 346 S.E.2d 657 (1986).

Indictment Upheld. — Indictment for second-degree rape, which met the criteria specified in this section for a proper indictment for rape, was sufficient to allow defendant to prepare a defense and to be protected from double jeopardy, and was thus not fatally defective. *State v. Walker*, — N.C. App. —, 353 S.E.2d 245 (1987).

Applied in *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983); *State v.*

Brown, 312 N.C. 237, 321 S.E.2d 856 (1984).

Stated in State v. Roberts, 310 N.C. 428, 312 S.E.2d 477 (1984).

Cited in State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986).

§ 15-144.2. Essentials of bill for sex offense.

CASE NOTES

Indictment under Subsection (b) Need Not Specify Sexual Act. — An indictment drafted pursuant to subsection (b) of this section without specifying which sexual act was committed is sufficient to charge the crime of first-degree sexual offense and to inform the defendant of such accusation. Should a defendant require additional information on the nature of the specific sexual act with which he stands charged, he may move for a bill of particulars. State v. Effler, 309 N.C. 742, 309 S.E.2d 203 (1983).

Defendant May Demand to Know Specific "Sexual Act" Charged. — When the State does not specify at the outset which "sexual act" was committed by a defendant, it can be required to do so before trial on the indictment is had. State v. Loudner, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

State Bound by Allegation of Specific Sexual Act. — While the State was not required to allege the specific nature of the sex act in the indictment, having chosen to do so, it is bound by its allegations. State v. Loudner, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

Evidence Must Correspond to Allegations. — The evidence in a criminal prosecution must correspond to the material allegations of the indictment, and where the evidence tends to show the commission of an offense not charged in

the indictment, the defendant's conviction thereof cannot stand. State v. Loudner, 77 N.C. App. 453, 335 S.E.2d 78 (1985).

Sufficiency of Indictment under Sections 15-144.1 and 15-144.2. — The short form indictments set out in § 15-144.1 and this section for first-degree rape and first-degree sexual offense provide adequate notice of the charges. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

Bill of Particulars. — A defendant may request a bill of particulars to obtain information to supplement the facts contained in the indictment. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

The granting of a motion for a bill of particulars lies within the discretion of the trial court and is not subject to review by the appellate courts except for gross abuse of discretion. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

The denial of a defendant's motion for a bill of particulars will be held error only upon a clear showing that the lack of timely access to the information significantly impaired the defendant's preparation and conduct of his case. State v. Randolph, 312 N.C. 198, 321 S.E.2d 864 (1984).

§ 15-155. Defects which do not vitiate.

CASE NOTES

I. GENERAL CONSIDERATION.

One purpose of an indictment is to give the defendant notice of the charge against him to the end that he may prepare a defense and be in a position to plead double jeopardy if he is again brought to trial for the same offense. Another purpose is to enable the court to know what judgment to pronounce in case of conviction. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

The provisions of § 15-144.1 do not prevail over this section. State v. Sills, 311 N.C. 370, 317 S.E.2d 379 (1984).

Stated in State v. Roberts, 310 N.C. 428, 312 S.E.2d 477 (1984).

Cited in State v. Williams, 318 N.C. 624, 350 S.E.2d 353 (1986).

II. TIME OF OFFENSE.

Failure to accurately state the date or time an offense is alleged to have

occurred does not invalidate a bill of indictment, nor does it justify reversal of a conviction obtained thereon. *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

A child's uncertainty as to the time or particular day when the offense charged was committed shall not be grounds for nonsuit where there is sufficient evidence that the defendant committed each essential act of the offense. *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987).

Variance between Time, etc. —

The State may prove that an offense charged was committed on some date other than the time named in the bill of indictment. A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense. *State v. Price*, 310 N.C. 596, 313 S.E.2d 556 (1984).

Ordinarily, the date alleged in the indictment is neither an essential nor a substantial fact, and therefore the State may prove that the offense was actually committed on some date other than that alleged in the indictment without the necessity of a motion to change the bill. *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

As Where He Relies upon Alibi. —

Where a defendant relies upon a defense of alibi, time becomes essential. *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

When time is not of the essence of the offense charged, an indictment may not be quashed for failure to allege the specific date on which the crime was committed. *State v. Price*, 310 N.C. 596, 313 S.E.2d 556 (1984).

Reversal of Dates, etc. —

The date given in a bill of indictment usually is not an essential element of the crime charged. The State may prove that the crime was in fact committed on some other date. This rule, however, may not be used to deprive a defendant of his defense. *State v. Sills*, 311 N.C. 370, 317 S.E.2d 379 (1984).

Change of Date on Indictment Permitted. — In prosecution for incest, where although the testimony of the young prosecuting witness as to the date of the offense differed from that of her mother, all of the State's evidence showed that the crime, if committed, took place on the Sunday of the weekend during which a certain individual visited the defendant's residence, the change on the indictment of the date of the offense, as permitted by the trial court, did not substantially alter the charge against the defendant, nor did it unfairly surprise him or prevent him from presenting a defense. *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

Fatal Variance Not Shown. —

There was no fatal variance between the allegations contained in the indictment and the actual proof presented by the State with regard to the date of the offense, where although the warrant and bill of indictment showed the date of the offense as March 13, 1985, the defendant was put on notice as to the child victim's uncertainty as to the date during a probable cause hearing, and where, additionally, the defendant did not in fact rely on the date stated in the indictment. *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986).

ARTICLE 15A.

Investigation of Offenses Involving Abandonment and Nonsupport of Children.

§ 15-155.2. District attorney to take action on report of aid to dependent child or illegitimate birth.

(c) Repealed by Session Laws 1985, c. 589, s. 8, effective January 1, 1986. (1959, c. 1210, s. 1; 1969, c. 982; 1973, c. 47, s. 2; c. 476, s. 138; 1985, c. 589, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985, c. 589, s. 64 provides that prosecutions for offenses occurring before the effective date of the act (Jan. 1, 1986) are not abated or affected by the act, and that the statutes that would be applicable but for the act remain applicable to those prosecutions.

Session Laws 1985, c. 589, s. 66 provides that rules to implement the act which are authorized to be adopted by the act or which are otherwise authorized to be adopted by law may be adopted at any time after ratification (July 4, 1985), but shall not become effective before January 1, 1986.

Session Laws 1985, c. 589, s. 65 is a severability clause.

Effect of Amendments. — The 1985 amendment, effective January 1, 1986, deleted subsection (c), which formerly read: "If, however, as a result of the investigation provided for in subsection (a) of this section the district attorney has reason to believe that the mother of the illegitimate child or who is recipient of aid to a dependent child, is a mental defective or suffers from a mental disease, mental disorder or mental illness within the meaning of G.S. 122-35.1, he shall make the affidavit provided for in G.S. 122-42 looking to the commitment of such person to the State hospital pursuant to Article 3, Chapter 122 of the General Statutes."

ARTICLE 17.

Trial in Superior Court.

§ 15-167. Extension of session of court by trial judge.

CASE NOTES

Cited in *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984).

§ 15-169. Conviction of assault, when included in charge.

CASE NOTES

Same — Attempted First Degree Rape. —

An indictment charging "attempted rape" necessarily includes assault on a

female as a lesser offense. *State v. Wortham*, 80 N.C. App. 54, 341 S.E.2d 76 (1986).

§ 15-170. Conviction for a less degree or an attempt.

Legal Periodicals. —

For comment on the defense of legal impossibility in light of *State v.*

Hageman, 307 N.C. 1, 296 S.E.2d 433 (1982), see 19 Wake Forest L. Rev. 605 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Facts of particular case, etc.—

The determination of whether one crime is a lesser included offense of another is made on a definitional, not a factual, basis. All essential elements of the lesser offense must be completely covered by the essential elements of the greater offense. *State v. Wortham*, 80 N.C. App. 54, 341 S.E.2d 76 (1986).

Offense Not Included If it Contains Element Not in Other Crime. — A crime is not a lesser included offense of another crime if the former contains any element that the latter does not. *State v. Peoples*, 65 N.C. App. 168, 308 S.E.2d 500 (1983).

Applied in *State v. Robinson*, 310 N.C. 530, 313 S.E.2d 571 (1984).

Cited in *State v. Bullard*, 82 N.C. App. 718, 347 S.E.2d 874 (1986).

III. LESSER AND INCLUDED OFFENSES.

An indictment charging a completed offense is sufficient to support a conviction for attempt to commit the crime charged. This statute applies even though the completed crime and the attempt are not in the same statute. *State v. Slade*, 81 N.C. App. 303, 343 S.E.2d

571, cert. denied and appeal dismissed, 318 N.C. 419, 349 S.E.2d 604 (1986).

Indictment charging defendant with the completed offense of giving a controlled substance to an inmate was sufficient to enable him to adequately prepare for trial and to protect him from being twice put in jeopardy for the same offense, so as to support his conviction of attempt to give a controlled substance to an inmate. *State v. Slade*, 81 N.C. App. 303, 343 S.E.2d 571, cert. denied and appeal dismissed, 318 N.C. 419, 349 S.E.2d 604 (1986).

Larceny Pursuant to Breaking or Entering. — While it is error for the court to permit the jury to convict based on some abstract theory not supported by the bill of indictment, an indictment charging defendant with larceny pursuant to a burglary was sufficient to uphold defendant's conviction for larceny pursuant to a breaking or entering, as felonious breaking or entering is a lesser degree of the offense of second degree burglary, and this section provides that upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a lesser degree of the same crime. *State v. McCoy*, 79 N.C. App. 273, 339 S.E.2d 419 (1986).

§ 15-173. Demurrer to the evidence.

CASE NOTES

I. GENERAL CONSIDERATION.

A motion to dismiss under § 15A-1227 is substantively identical to a motion for nonsuit under this section. *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

Applied in *State v. Elliott*, 69 N.C. App. 89, 316 S.E.2d 632 (1984); *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984); *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984); *State v. Upright*, 72 N.C. App. 94, 323 S.E.2d 479 (1984); *State v. Wilson*, 73 N.C. App. 398, 326 S.E.2d 360 (1985).

Cited in *State v. Lowery*, 309 N.C. 763, 309 S.E.2d 232 (1983); *State v. Nelson*, 69 N.C. App. 455, 317 S.E.2d 70 (1984); *State v. Ausley*, 78 N.C. App. 791, 338 S.E.2d 547 (1986).

II. OTHER MOTIONS COMPARED.

Motion to dismiss under § 15A-1227(a)(1) for insufficiency of the evidence to go to the jury is tantamount to a motion for nonsuit under this section. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985); *State v. Griffin*, — N.C. —, 355 S.E.2d 474 (1987); *State v. Stocks*, — N.C. —, 355 S.E.2d 492 (1987).

III. QUESTION PRESENTED BY MOTION.

Question Presented. —

In accord with 9th paragraph in the main volume. See *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

When a defendant moves under § 15A-1227(a)(2) or under this section for dismissal at the close of all of the

evidence, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of the defendant's being the perpetrator of the offense. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

IV. ALLOWANCE OF MOTION.

Where complete defense is established by State's case, etc. —

When the State's evidence presents a complete defense, a defendant's motion for nonsuit should be allowed. *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

V. DENIAL OF MOTION.

B. Appeal from Denial of Motion.

Consideration of Entire Evidence, etc. —

Defendant's exception to the denial of his motion to dismiss, made at the close of all of the evidence, presented the issue of the sufficiency of all of the evidence to go to the jury. Therefore, for purposes of reviewing this assignment of error, the court would consider all of the evidence introduced at trial, and would not determine whether that evidence was competent. *State v. Evangelista*, — N.C. —, 353 S.E.2d 375 (1987).

VI. EVIDENCE.

Defendant's motion to dismiss must be considered in light of all the evidence introduced by the State, as well as that introduced by defendant. *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

Defendant's Evidence May Be Considered. — In considering a motion to dismiss made at the close of all the evidence, the defendant's evidence as well as the State's evidence may be considered. *State v. Davis*, 80 N.C. App. 523, 342 S.E.2d 530 (1986).

Need Not Exclude Every Reasonable Hypothesis, etc. —

In accord with original. See *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Evidence Considered in Light Most Favorable to State. —

In accord with 1st paragraph in the

main volume. See *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

In accord with 6th paragraph in original. See *State v. Dow*, 70 N.C. App. 82, 318 S.E.2d 883 (1984).

Upon defendant's motion to dismiss, all the evidence favorable to the State must be considered, such evidence must be deemed true and considered in the light most favorable to the State, and the State is entitled to every inference of fact which may be reasonably deduced therefrom. *State v. Stanley*, 74 N.C. App. 178, 327 S.E.2d 902, cert. denied, 314 N.C. 546, 335 S.E.2d 318 (1985).

When defendant moves under § 15A-1227(a)(2) or under this section for dismissal at the close of all the evidence, the trial court is to view all of the evidence in the light most favorable to the state and give the state all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Contradictions and Discrepancies in Evidence Are for Jury, etc. —

In accord with 1st paragraph in original. See *State v. Dow*, 70 N.C. App. 82, 318 S.E.2d 883 (1984).

Contradictions and Discrepancies, etc. —

Contradictions and discrepancies in the evidence are for the jury to resolve and do not warrant dismissal. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

VII. INTRODUCTION OF TESTIMONY BY DEFENDANT AT TRIAL.

Effect of Defendant Introducing Testimony, etc. —

In accord with 1st paragraph in the main volume. See *State v. Evangelista*, — N.C. —, 353 S.E.2d 375 (1987).

In accord with 2nd paragraph in original. See *State v. Lilley*, 78 N.C. App. 100, 337 S.E.2d 89 (1985), discretionary review denied as to additional issues, 316 N.C. 199, 341 S.E.2d 582 (1986); *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985); *State v. Griffin*, — N.C. —, 355 S.E.2d 474 (1987); *State v. Stocks*, — N.C. —, 355 S.E.2d 492 (1987).

In accord with 3rd paragraph in main volume. See *State v. Davis*, 80 N.C. App. 523, 342 S.E.2d 530 (1986).

North Carolina State Library
Raleigh, N.C.

ARTICLE 19.

Execution.

§ 15-194. Time for execution.

CASE NOTES

Cited in *State v. McDowell*, 310 N.C.
61, 310 S.E.2d 301 (1984).

ARTICLE 23.

Expunction of Records.

§§ 15-223, 15-224: Recodified as §§ 15A-145 and 15A-146 by
Session Laws 1985, c. 636, s. 1, effective July 5,
1985.

Chapter 15A.

Criminal Procedure Act.

SUBCHAPTER I. GENERAL.

Article 5.

Expunction of Records.

Sec.

15A-145. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor.

15A-146. Expunction of records when charges are dismissed or there are findings of not guilty.

15A-147 to 15A-172. [Reserved.]

SUBCHAPTER III. CRIMINAL PROCESS.

Article 17.

Criminal Process.

15A-302. Citation.

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Arrest.

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15A-402. Territorial jurisdiction of officers to make arrests.

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15A-534. Procedure for determining conditions of pretrial release.

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15A-544. Forfeiture.

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Article 31.

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grand juries; other preliminary matters.

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15A-631. Grand jury venue.

15A-632 to 15A-640. [Reserved.]

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Speedy Trial.

15A-701. Time limits and exclusions.

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Article 45.

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15A-824. Definitions.

15A-825. Treatment due victims and witnesses.

15A-826. Victim and witness assistants.

15A-827. Scope.

15A-828 to 15A-849. [Reserved.]

SUBCHAPTER IX. PRETRIAL PROCEDURE.

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Pleadings and Joinder.

15A-922. Use of pleadings in misdemeanor cases generally.

Article 50.

Voluntary Dismissal.

15A-932. Dismissal with leave when defendant fails to appear and cannot be readily found.

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

Article 56.

Incapacity to Proceed.

15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

15A-1003. Referral of incapable defendant for civil commitment proceedings.

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defendant and return for trial.

Article 57.

Pleas.

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Article 58.

Procedures Relating to Guilty Pleas in Superior Court.

15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.

Article 61.

Granting of Immunity to Witnesses.

15A-1051. Immunity; general provisions.

SUBCHAPTER XI. TRIAL PROCEDURE IN DISTRICT COURT.

Article 66.

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15A-1111. General procedure for disposition of infractions.

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15A-1113. Prehearing procedure.

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15A-1116. Enforcement of sanctions.

15A-1117. [Recodified.]

15A-1118. Costs.

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15A-1119 to 15A-1200. [Reserved.]

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

Article 73.

Criminal Jury Trial in Superior Court.

15A-1223. Disqualification of judge.

15A-1232. Jury instructions; explanation of law; opinion prohibited.

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

Article 80.

Defendants Found Not Guilty by Reason of Insanity.

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Imprisonment.

15A-1351. Sentence of imprisonment; incidents; special probation.

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15A-1361. Authorized fines and penalties.

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Article 85.

Parole.

15A-1371. Parole eligibility, consideration, and refusal.

15A-1374. Conditions of parole.

Article 85A.

Parole of Certain Convicted Felons.

15A-1380.2. Reentry parole of felons.

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

Article 90.

Appeals from Magistrates and District Court Judges.

15A-1432. Appeals by State from district court judge.

Article 91.

Sec.

Appeal to Appellate Division.

15A-1448. Procedures for taking appeal.

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15A-1446. Requisites for preserving the right to appellate review.

SUBCHAPTER I. GENERAL.

ARTICLE 1.

Definitions and General Provisions.

§ 15A-101. Definitions.

Legal Periodicals. —

For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

There are no cases which have construed subdivision (4a), which governs "entry of judgment" in criminal cases. However, § 1A-1, Rule 58 is sufficiently analogous to provide guidance in the area. *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984).

Subdivision (4a) Should Apply to Judgments and Orders. — Although subdivision (4a) of this section does not specifically apply to orders, the Supreme Court thinks the same rule should apply

to judgments and orders. *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984).

Many rights relating to the appeals process are "keyed" to the time of "entry of judgment," it is therefore imperative that the judge's decisions become part of the court's records and that all interested persons know the exact date on which judgment is entered. *State v. Boone*, 310 N.C. 284, 311 S.E.2d 552 (1984).

Cited in *State v. Norris*, 77 N.C. App. 525, 335 S.E.2d 764 (1985).

ARTICLE 3.

Venue.

§ 15A-131. Venue generally.

CASE NOTES

Improper venue will not deprive the court of jurisdiction. *State v. Bolt*, 81 N.C. App. 133, 344 S.E.2d 51 (1986).

Principles of venue, not jurisdiction, are involved when deciding the

proper county in which to bring a criminal action. *State v. Bolt*, 81 N.C. App. 133, 344 S.E.2d 51 (1986).

Cited in *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986).

§ 15A-132. Concurrent venue.

CASE NOTES

Reason for grant of exclusive venue to the first court in which charges are filed is to prevent confusion and contentions between different courts, each seeking to exercise jurisdiction, and not to shield one accused of crime from prosecution when the court in which a complaint is first lodged loses its exclusive venue by dismissal of the case. *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986).

Loss of Exclusive Venue When Process Is Dismissed. — A county which has acquired exclusive venue pursuant to subsection (a) or (b) of this sec-

tion loses that exclusive venue when the criminal process upon which the exclusive venue is based is dismissed. *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986).

An indictment returned "no true bill" does not involve the issuance of criminal process, since it lacks the force and effect to instigate criminal action against an individual. *State v. Vines*, 317 N.C. 242, 345 S.E.2d 169 (1986).

Applied in *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

Cited in *State v. Bolt*, 81 N.C. App. 133, 344 S.E.2d 51 (1986).

§ 15A-134. Offense occurring in part outside North Carolina.

CASE NOTES

Jurisdiction Where Any Part of Crime Occurred. — This section does not fix jurisdiction where the crime was completed, but where any part of the crime occurred. *State v. First Resort Properties*, 81 N.C. App. 499, 344 S.E.2d 354 (1986).

Fact that check was issued in North Carolina would support jurisdiction of worthless check charge under this section, even though an officer of defendant added the date and payee's name in Florida, and it was physically transferred in Florida, subject to the condition that payee hold it until officer got back in touch with him. Moreover, officer's call four days later from North Carolina authorizing payee to deposit the check also supported a conclusion that some part of the delivery occurred in North Carolina. *State v. First Resort*

Properties, 81 N.C. App. 499, 344 S.E.2d 354 (1986).

Proof of State Offense Required. — In a prosecution for larceny and felonious possession of stolen goods, the bare fact that defendant possessed the car in the District of Columbia a few hours after its theft from an automobile dealership in North Carolina, without any supporting evidence was not sufficient to establish a prima facie showing of jurisdiction to warrant its submission to the jury. There was not a rational connection between the defendant's possession of the stolen vehicle in Washington and the inference which the jury would be allowed to draw, that being the defendant possessed the car in North Carolina, to meet due process standards. *State v. Williams*, 74 N.C. App. 131, 327 S.E.2d 300 (1985).

§ 15A-135. Allegation of venue conclusive in absence of timely motion.

CASE NOTES

Effect of Section. — The allegation in a criminal pleading of the county where the charged offense occurred is not essentially one of venue. Under the

common law a grand jury could only indict for crimes which allegedly occurred in its own county. The statement of the county where the offense took place es-

established prima facie jurisdiction of the grand jury to return the indictment. Former § 15-134 did not change this. It merely limited a defendant's means of attacking the indictment on the ground that the offense occurred in a county other than that named in the indictment. Current § 15A-135, however, only limits a defendant's means of attacking venue. Since the statement in an indict-

ment of the county where the crime allegedly occurred establishes prima facie jurisdiction, a challenge to this statement can be asserted at any time as stated in § 15A-952(d). *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

Cited in *State v. Flowers*, 318 N.C. 208, 347 S.E.2d 773 (1986).

§ 15A-136. Venue for sexual offenses.

CASE NOTES

This section addresses a matter of venue, i.e., the location of the tribunal where a defendant may be compelled to stand trial. *State v. Flowers*, 318 N.C. 208, 347 S.E.2d 773 (1986).

No provision of this section ex-

pands the power of grand juries to permit them to return indictments for criminal activity outside their territorial boundaries. *State v. Flowers*, 318 N.C. 208, 347 S.E.2d 773 (1986).

ARTICLE 5.

Expunction of Records.

§ 15A-145. Expunction of records for first offenders under the age of 18 at the time of conviction of misdemeanor.

(a) Whenever any person who has not yet attained the age of 18 years and has not previously been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States, the laws of this State or any other state, pleads guilty to or is guilty of a misdemeanor other than a traffic violation, he may file a petition in the court where he was convicted for expunction of the misdemeanor from his criminal record. The petition cannot be filed earlier than two years after the date of the conviction or any period of probation, whichever occurs later, and the petition shall contain, but not be limited to, the following:

- (1) An affidavit by the petitioner that he has been of good behavior for the two-year period since the date of conviction of the misdemeanor in question and has not been convicted of any felony, or misdemeanor in question and has not been convicted of any felony, or misdemeanor other than a traffic violation, under the laws of the United States or the laws of this State or any other state.
- (2) Verified affidavits of two persons who are not related to the petitioner or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives and that his character and reputation are good.
- (3) A statement that the petition is a motion in the cause in the case wherein the petitioner was convicted.
- (4) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the

petitioner was convicted and, if different, the county of which the petitioner is a resident, showing that the petitioner has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the misdemeanor in question or during the two-year period following that conviction.

The petition shall be served upon the district attorney of the court wherein the case was tried resulting in conviction. The district attorney shall have 10 days thereafter in which to file any objection thereto and shall be duly notified as to the date of the hearing of the petition.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the two-year period that he deems desirable.

(b) If the court, after hearing, finds that the petitioner had remained of good behavior and been free of conviction of any felony or misdemeanor, other than a traffic violation, for two years from the date of conviction of the misdemeanor in question, and petitioner was not 18 years old at the time of the conviction in question, it shall order that such person be restored, in the contemplation of the law, to the status he occupied before such arrest or indictment or information. No person as to whom such order has been entered shall be held thereafter under any provision of any laws to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, or indictment, information, or trial, or response to any inquiry made of him for any purpose.

(c) The court shall also order that the said misdemeanor conviction be expunged from the records of the court, and direct all law-enforcement agencies bearing record of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with a form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation. The cost of expunging such records shall be taxed against the petitioner.

(d) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted a discharge under the provisions of this section, and the Administrative Office of the Courts, the names of those persons granted a discharge under the provisions of this section, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in such file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted a discharge. (1973, c. 47, s. 2; c. 748; 1975, c. 650, s. 5; 1977, c. 642, s. 1; c. 699, ss. 1, 2; 1979, c. 431, ss. 1, 2; 1985, c. 636, s. 1.)

Editor's Note. — This Article is former Article 23 of Chapter 15, as recodified by Session Laws 1985, c. 636, s. 1. The historical citations to the sections in the former Article have been added to the corresponding sections in this Article as recodified.

Session Laws 1985, c. 636, s. 8 provides that the act is effective upon ratification. The act was ratified on July 5, 1985.

§ 15A-146. Expunction of records when charges are dismissed or there are findings of not guilty.

(a) If any person is charged with a crime, either a misdemeanor or a felony, and the charge is dismissed, or a finding of not guilty is entered, that person may apply to the court of the county where the charge was brought for an order to expunge from all official records any entries relating to his apprehension or trial. The court shall hold a hearing on the application and, upon finding that the person had not previously received an expungement and that the person had not previously been convicted of any felony or misdemeanor other than a traffic violation under the laws of the United States, this State, or any other state, the court shall order the expunction. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury, or to be guilty of otherwise giving a false statement or response to any inquiry made for any purpose, by reason of his failure to recite or acknowledge any expunged entries concerning apprehension or trial.

(b) The court may also order that the said entries shall be expunged from the records of the court, and direct all law-enforcement agencies bearing record of the same to expunge their records of the entries. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency. The sheriff, chief or head of such other arresting agency shall then transmit the copy of the order with the form supplied by the State Bureau of Investigation to the State Bureau of Investigation, and the State Bureau of Investigation shall forward the order to the Federal Bureau of Investigation. The costs of expunging such records shall be taxed against the petitioner.

(c) The Clerk of Superior Court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts, the names of those persons granted an expungement under the provisions of this section and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted such expungement. The information contained in such files shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense has been previously granted an expungement. (1979, c. 61; 1985, c. 636, ss. 1-7.)

Effect of Amendments. — The 1985 amendment, effective July 5, 1985, designated the first paragraph as section (a), in subsection (a) deleted "Except as otherwise provided in G.S. 90-96" at the beginning of the first sentence, substituted "the person had not previously re-

ceived an expungement and that the person" for "at the time any of the proceedings against him occurred the person had not attained the age of 18 years and" in the second sentence, and deleted a former last sentence, which read: "The clerk shall send a copy of the expunction

order to any public official known to be a custodian of such entry," and added subsections (b) and (c).

CASE NOTES

Cited in *Bates v. City of Gastonia*, 653 F. Supp. 960 (W.D.N.C. 1987).

§§ 15A-147 to 15A-172: Reserved for future codification purposes.

SUBCHAPTER II. LAW-ENFORCEMENT AND INVESTIGATIVE PROCEDURES.

ARTICLE 9.

Search and Seizure by Consent.

§ 15A-221. General authorization; definition of "consent."

CASE NOTES

Stated in *State v. Williams*, 67 N.C. App. 519, 313 S.E.2d 236 (1984).

§ 15A-222. Person from whom effective consent may be obtained.

CASE NOTES

Quoted in *State v. Moore*, 316 N.C. 328, 341 S.E.2d 733 (1986).

§ 15A-223. Permissible scope of consent search and seizure.

CASE NOTES

Police officer's delivery of seizure inventory form to defendant was not an "initiation" of conversation. Indeed, law enforcement authorities are required to make a list of the things seized, and deliver a receipt embodying the list to the person who consented to the search. The fact that delivery of the

receipt was made after a request for the presence of an attorney does not alter the routineness of such a delivery nor does it thereby constitute the initiation of questioning. *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985).

Applied in *State v. Williams*, 67 N.C. App. 519, 313 S.E.2d 236 (1984).

ARTICLE 10.

Other Searches and Seizures.

§ 15A-231. Other searches and seizures.

CASE NOTES

**II. SEARCH INCIDENT TO
ARREST OR OTHER
DETENTION.**

nal. See *State v. Hart*, 64 N.C. App. 699,
308 S.E.2d 474 (1983).

**Property Which May Be Taken,
etc. —**

In accord with 1st paragraph in origi-

ARTICLE 11.

Search Warrants.

§ 15A-241. Definition of search warrant.

CASE NOTES

Cited in In re Superior Court Order
Dated April 8, 1983, 70 N.C. App. 63,
318 S.E.2d 843 (1984).

§ 15A-243. Who may issue a search warrant.

CASE NOTES

Applied in *State v. Holloway*, 66 N.C.
App. 491, 311 S.E.2d 707 (1984).

Cited in *State v. Holloway*, 311 N.C.
573, 319 S.E.2d 261 (1984).

§ 15A-244. Contents of the application for a search
warrant.

CASE NOTES

I. GENERAL CONSIDERATION.**Language of Application. —**

The warrant should describe with particularity the place to be searched since general warrants are repugnant to the Fourth Amendment, which has been applied to the states through incorporation in the Fourteenth Amendment. *State v. Atwell*, 62 N.C. App. 643, 303 S.E.2d 402 (1983).

Cited in *State v. Teasley*, 82 N.C.
App. 150, 346 S.E.2d 227 (1986).

II. PROBABLE CAUSE.

A search warrant can only be is-

sued upon a determination of probable cause. The person who makes that determination must be a neutral and detached magistrate instead of the officer engaged in the often competitive enterprise of ferreting out crime. *State v. Atwell*, 62 N.C. App. 643, 303 S.E.2d 402 (1983).

Probable Cause Determined, etc.

Observations of fellow officers engaged in the same investigation are plainly a reliable basis for a warrant applied for by one of their number. *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984).

Probable cause does not mean actual and positive cause, etc. —

In accord with original. See *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984).

Probable cause does not deal in certainties, etc. —

Probable cause is concerned with probabilities, the practical considerations of everyday life upon which reasonable and prudent men act. *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984).

Sworn Statement Required for Probable Cause Warrant. — A magistrate issuing a warrant can base a finding of probable cause only on statements of fact confirmed by oath or affirmation of the party making the statement, or on information which the magistrate records or contemporaneously summarizes in the record. The necessity of a sworn statement is consistent with existing case law. *State v. Heath*, 73 N.C. App. 391, 326 S.E.2d 640 (1985).

Probable cause may be based upon hearsay evidence. The officer making the affidavit may do so in reliance upon information reported to him by other officers in the performance of their duties. *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984).

Sufficiency of Probable Cause. — For resolving questions arising under N.C. Const., art. I, § 20 with regard to the sufficiency of probable cause to support the issuance of a search warrant, the Supreme Court of North Carolina adopts the totality of circumstances test of *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) and *Massachusetts v. Upton*, 466 U.S. 727, 104 S. Ct. 2085, 80 L. Ed. 2d 721 (1984) and rejects the two-pronged test of *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964) and

Spinelli v. United States, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969). *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984).

III. AFFIDAVITS AND INFORMANTS.

Sufficiency of Affidavit Generally. —

In accord with original. See *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984).

The facts set forth in an affidavit for a search warrant must be such that a reasonably discreet and prudent person would rely upon them before they will be held to provide probable cause justifying the issuance of a search warrant. *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984).

What Tip Must Show. —

When the application for a search warrant is based on an informant's tip, however, it must meet the two-prong test developed by the Supreme Court in *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), and *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964). First, the affidavit must set forth sufficient underlying circumstances to permit a neutral and detached magistrate to understand how the informant reached his conclusion. Second, the affidavit must establish the reliability of the informant. This can be done by showing prior use and reliability of the informant, a declaration against his penal interest, clear and precise details in the tip indicating personal observation and knowledge of the location of the evidence, or membership of the informant in a reliable group like the clergy. *State v. Atwell*, 62 N.C. App. 643, 303 S.E.2d 402 (1983).

§ 15A-245. Basis for issuance of a search warrant; duty of the issuing official.

CASE NOTES

I. GENERAL CONSIDERATION.

Sworn Statement Required for Probable Cause Warrant. — A magistrate issuing a warrant can base a finding of probable cause only on statements of fact confirmed by oath or affirmation of the party making the statement, or on information which the magistrate re-

records or contemporaneously summarizes in the record. The necessity of a sworn statement is consistent with existing case law. *State v. Heath*, 73 N.C. App. 391, 326 S.E.2d 640 (1985).

Applied in *State v. Atwell*, 62 N.C. App. 643, 303 S.E.2d 402 (1983).

Quoted in *United States v. Edwards*, 798 F.2d 686 (4th Cir. 1986).

Cited in *State v. Teasley*, 82 N.C. App. 150, 346 S.E.2d 227 (1986).

II. PROBABLE CAUSE.

The standard for determining probable cause for issuance of a search warrant based on information from informants is the totality of the circumstances analysis that traditionally has informed probable cause determinations. *State v. Craver*, 70 N.C. App. 555, 320 S.E.2d 431 (1984).

The totality of the circumstances analysis mandates a practical, common sense determination of probable cause. *State v. Craver*, 70 N.C. App. 555, 320 S.E.2d 431 (1984).

III. AFFIDAVITS.

Sufficiency of Affidavit. —

In accord with 2nd paragraph in original. See *State v. Goforth*, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

Purely Conclusory, etc. —

In accord with 1st paragraph in original. See *State v. Goforth*, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

IV. INFORMANTS.

Mere characterization of informant as reliable, etc. —

If an unidentified informant has supplied all or part of the information contained in the affidavit supplementing all application for a search warrant, some of the underlying facts and circumstances which show the informant is credible or that the information is reliable must be set forth before the issuing officer. *State v. Craver*, 70 N.C. App. 555, 320 S.E.2d 431 (1984).

§ 15A-249. Officer to give notice of identity and purpose.

CASE NOTES

Applied in *State v. Edwards*, 70 N.C. App. 317, 319 S.E.2d 613 (1984).

Cited in *State v. Edwards*, — N.C. App. —, 354 S.E.2d 344 (1987).

§ 15A-251. Entry by force.

CASE NOTES

Applied in *State v. Edwards*, 70 N.C. App. 317, 319 S.E.2d 613 (1984).

§ 15A-252. Service of a search warrant.

CASE NOTES

Applied in *State v. Copeland*, 64 N.C. App. 612, 307 S.E.2d 574 (1983).

§ 15A-253. Scope of the search; seizure of items not named in the warrant.

CASE NOTES

II. PLAIN VIEW.

A padlock found under telephone book on bedside table, which was relevant to murder case, was lawfully seized

from motel room pursuant to a warrant authorizing search for bloody clothing. *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986).

ARTICLE 14.

Nontestimonial Identification.

§ 15A-271. Authority to issue order.

CASE NOTES

This Article was enacted in response to dictum contained in Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969) inviting the use of narrowly circumscribed procedures for obtaining the fingerprints of individuals for whom there is no probable cause to arrest. *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986).

Article Inapplicable to, etc. —

Although this section does not apply to an in-custody defendant, it does not follow that a trial judge is without authority to issue a nontestimonial identification order where the defendant is in custody. *State v. Vereen*, 312 N.C. 499, 324 S.E.2d 250 (1985), cert. denied, 471 U.S. 1094, 105 S. Ct. 2170, 85 L. Ed. 2d 526 (1984).

Article Inapplicable to In-Custody Accused. —

In accord with 1st paragraph in main volume. See *State v. Norris*, 77 N.C. App. 525, 335 S.E.2d 764 (1985).

This Article applies only to suspects and accused persons before arrest, and persons formally charged and arrested, who have been released from custody pending trial. The statute does not apply to an in custody accused. *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986).

Blood Sample Taken from Defendant Confined in County Jail. —

Where defendant had been indicted for first-degree murder and was in custody at the county jail when nontestimonial identification order was issued upon the State's motion, it was error for the trial court to issue the order, and defendant's Fourth Amendment right to be free from unreasonable searches and seizures was violated when sample of his blood was drawn pursuant to this order in the absence of a search warrant. *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986), declining, however, to apply the exclusionary rule to this good faith violation of the Fourth Amendment.

§ 15A-272. Time of application; additional investigative procedures not precluded.

CASE NOTES

Juvenile Procedure Compared. —

Under this section, the adult statute, time of application focuses on the arrest of the suspect, while § 7A-597 focuses on taking the juvenile into custody, indi-

cating an expanded time period when procedural protection of juveniles is necessary. *State v. Norris*, 77 N.C. App. 525, 335 S.E.2d 764 (1985).

§ 15A-273. Basis for order.

CASE NOTES

Blood Sample Taken from Defendant Confined in County Jail. —

Where defendant had been indicted for first-degree murder and was in custody at the county jail when nontestimonial identification order was issued upon the State's motion, it was error for the trial court to issue the order, and defendant's Fourth Amendment right to be free from

unreasonable searches and seizures was violated when the sample of his blood was drawn pursuant to this order in the absence of a search warrant. *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986), declining, however, to apply the exclusionary rule to this good faith violation of the Fourth Amendment.

§ 15A-274. Issuance of order.

CASE NOTES

Blood Sample Taken from Defendant Confined in County Jail. — Where defendant had been indicted for first-degree murder and was in custody at the county jail when nontestimonial identification order was issued upon the State's motion, it was error for the trial court to issue the order, and defendant's Fourth Amendment right to be free from unreasonable searches and seizures was

violated when the sample of his blood was drawn pursuant to this order in the absence of a search warrant. *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986), declining, however, to apply the exclusionary rule to this good faith violation of the Fourth Amendment.

Stated in *State v. Vereen*, 312 N.C. 499, 324 S.E.2d 250 (1985).

§ 15A-277. Service of order.

CASE NOTES

Service of Order. — Under this section, an order to submit to nontestimonial identification procedures must be served at least 72 hours in advance of the time of compliance and may be served by a law enforcement officer. *State v. Young*, 317 N.C. 396, 346 S.E.2d 626 (1986).

Fact that service of a nontestimonial identification order occurs sub-

sequent to invocation of right to counsel does not affect the routine nature of the service of the order, nor does it constitute the initiation of conversation. *State v. Young*, 317 N.C. 396, 346 S.E.2d 626 (1986).

Applied in *State v. Maccia*, 311 N.C. 222, 316 S.E.2d 241 (1984).

§ 15A-278. Contents of order.

CASE NOTES

Applied in *State v. Maccia*, 311 N.C. 222, 316 S.E.2d 241 (1984).

§ 15A-279. Implementation of order.

CASE NOTES

Nontestimonial identification procedures are those procedures by which a suspect's fingerprints, palm prints, footprints, measurements, blood specimen, urine specimen, saliva sample, hair sample, handwriting exemplar, voice sample or photographs are obtained. *State v. Young*, 317 N.C. 396, 346 S.E.2d 626 (1986).

Showing to Obtain Suppression of Statement. — In order to obtain the suppression of his statement under subsection (d) of this section, a defendant

must show: (1) That the statement was made during nontestimonial identification procedures, and (2) that the statement was made without the presence of counsel. *State v. Young*, 317 N.C. 396, 346 S.E.2d 626 (1986).

Statement When Served with Order. — Suppression of statement made by defendant when he was merely being served with a copy of an order requiring his submission to nontestimonial identification procedures, and not made during any nontestimonial identification

procedure, was not required by subsection (d) of this section. *State v. Young*, 317 N.C. 396, 346 S.E.2d 626 (1986).

Admission of evidence that defendant did not submit a blood sample

did not violate defendant's rights under subsection (d) of this section. *State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986).

§ 15A-281. Nontestimonial identification order at request of defendant.

CASE NOTES

The unannounced, unexpected presence of the robbery victim at the defendant's arraignment did not deny the defendant the right to a neutral line up procedure. The defendant made no request for such a procedure, nor did he ask the trial court to find that he intended to request such a procedure and

that the procedure could not be fairly conducted. *State v. Latta*, 75 N.C. App. 611, 331 S.E.2d 213, cert. denied, 314 N.C. 334, 333 S.E.2d 494 (1985).

Stated in *State v. Abdullah*, 66 N.C. App. 173, 310 S.E.2d 413 (1984).

Cited in *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986).

SUBCHAPTER III. CRIMINAL PROCESS.

ARTICLE 17.

Criminal Process.

§ 15A-301. Criminal process generally.

CASE NOTES

Cited in *In re King*, 79 N.C. App. 139, 339 S.E.2d 87 (1986).

§ 15A-302. Citation.

(a) **Definition.** — A citation is a directive, issued by a law enforcement officer or other person authorized by statute, that a person appear in court and answer a misdemeanor or infraction charge or charges.

(b) **When Issued.** — An officer may issue a citation to any person who he has probable cause to believe has committed a misdemeanor or infraction.

(c) **Contents.** — The citation must:

- (1) Identify the crime charged, including the date, and where material, identify the property and other persons involved,
- (2) Contain the name and address of the person cited, or other identification if that cannot be ascertained,
- (3) Identify the officer issuing the citation, and
- (4) Cite the person to whom issued to appear in a designated court, at a designated time and date.

(d) **Service.** — A copy of the citation shall be delivered to the person cited who may sign a receipt on the original which shall thereafter be filed with the clerk by the officer. If the cited person refuses to sign, the officer shall certify delivery of the citation by

signing the original, which shall thereafter be filed with the clerk. Failure of the person cited to sign the citation shall not constitute grounds for his arrest or the requirement that he post a bond.

(e) Dismissal by Prosecutor. — If the prosecutor finds that no crime or infraction is charged in the citation, or that there is insufficient evidence to warrant prosecution, he may dismiss the charge and so notify the person cited. An appropriate entry must be made in the records of the clerk. It is not necessary to enter the dismissal in open court or to obtain consent of the judge.

(f) Citation No Bar to Criminal Summons or Warrant. — If the offense is a misdemeanor, a criminal summons or a warrant may issue notwithstanding the prior issuance of a citation for the same offense.

(g) Preparation of Form. — The form and content of the citation is as prescribed by the Administrative Officer of the Courts. The form of citation used for violation of the motor vehicle laws must contain a notice that the driving privilege of the person cited may be revoked for failure to appear as cited, and must be prepared as provided in G.S. 7A-148(b). (1973, c. 1286, s. 1; 1975, c. 166, ss. 3, 27; 1983, c. 327, s. 4; 1985, c. 385; c. 764, s. 4.)

Editor's Note. — Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

Effect of Amendments. —

Session Laws 1985, c. 385, effective June 13, 1985, rewrote subsection (d), which formerly read: "Service. — A copy of the citation must be delivered to the

person cited who must sign a receipt on the original, which the officer must file with the clerk."

Session Laws 1985, c. 764, s. 4, effective September 1, 1986, and applicable to offenses committed on or after that date, substituted "a misdemeanor or infraction charge or charges" for "criminal charges" at the end of subsection (a), inserted "or infraction" at the end of subsection (b), inserted "or infraction" in the first sentence of subsection (e), and inserted "If the offense is a misdemeanor," at the beginning of the text of subsection (f).

§ 15A-303. Criminal summons.

(a) Definition. — A criminal summons consists of a statement of the crime or infraction of which the person to be summoned is accused, and an order directing that the person so accused appear and answer to the charges made against him. It is based upon a showing of probable cause supported by oath or affirmation.

(b) Statement of the Crime or Infraction. — The criminal summons must contain a statement of the crime or infraction of which the person summoned is accused. No criminal summons is invalid because of any technicality of pleading if the statement is sufficient to identify the crime or infraction.

(c) Showing of Probable Cause; Record. — The showing of probable cause for the issuance of a criminal summons, and the record thereof, is the same as provided in G.S. 15A-304(d) for the issuance of a warrant for arrest.

(d) Order to Appear. — The summons must order the person named to appear in a designated court at a designated time and date and answer to the charges made against him and advise him that he may be held in contempt of court for failure to appear.

Except for cause noted in the criminal summons by the issuing official, an appearance date may not be set more than one month following the issuance or reissuance of the criminal summons.

(e) Enforcement. —

- (1) If the offense charged is a criminal offense, a warrant for arrest, based upon the same or another showing of probable cause, may be issued by the same or another issuing official, notwithstanding the prior issuance of a criminal summons.
- (2) If the offense charged is a criminal offense, an order for arrest, as provided in G.S. 15A-305, may issue for the arrest of any person who fails to appear as directed in a duly executed criminal summons.
- (3) A person served with criminal summons who willfully fails to appear as directed may be punished for contempt as provided in G.S. 5A-11.
- (4) Repealed by Session Laws 1975, c. 166, s. 4.

(f) Who May Issue. — A criminal summons, valid throughout the State, may be issued by any person authorized to issue warrants for arrest. (1973, c. 1286, s. 1; 1975, c. 166, ss. 4, 5; 1975, 2nd Sess., c. 983, s. 138; 1983, c. 294, s. 3; 1985, c. 764, s. 5.)

Editor's Note. — Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

Effect of Amendments. —

The 1985 amendment, effective Sep-

tember 1, 1986, and applicable to offenses committed on or after that date, inserted "or infraction" in the first sentence of subsection (a), inserted "or infraction" in the subsection catchline to subsection (b) and in the first and second sentences of that subsection, inserted "If the offense charged is a criminal offense," at the beginning of subdivision (e)(1), and inserted "If the offense charged is a criminal offense," at the beginning of subdivision (e)(2).

§ 15A-305. Order for arrest.

CASE NOTES

Applied in *State v. Koberlein*, 309 N.C. 601, 308 S.E.2d 442 (1983).

SUBCHAPTER IV. ARREST.

ARTICLE 20.

Arrest.

§ 15A-401. Arrest by law-enforcement officer.

(b) Arrest by Officer Without a Warrant. —

- (1) Offense in Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe has committed a criminal offense in the officer's presence.

- (2) Offense Out of Presence of Officer. — An officer may arrest without a warrant any person who the officer has probable cause to believe:
- a. Has committed a felony; or
 - b. Has committed a misdemeanor, and:
 1. Will not be apprehended unless immediately arrested, or
 2. May cause physical injury to himself or others, or damage to property unless immediately arrested; or
 - c. Has committed a misdemeanor under G.S. 14-72.1.
- (3) Subdivisions (1) and (2) shall apply to arrest for assault, for communicating a threat, or for domestic criminal trespass, already committed or being committed by a person who is the spouse or former spouse of the alleged victim or by a person with whom the alleged victim is living or has lived as if married.

(1868-9, c. 178, subch. 1, ss. 3, 5; Code, ss. 1126, 1128; Rev., ss. 3178, 3180; C.S., ss. 4544, 4546; 1955, c. 58; 1973, c. 1286, s. 1; 1979, c. 561, s. 3; c. 725, s. 4; 1983, c. 762, s. 1; 1985, c. 548.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 amendment, effective October 1, 1985, and applicable to offenses committed on or after that date, substituted a semicolon and "or" for a period at the end of subparagraph (b)(2)b2 and added paragraph (b)(2)c.

Legal Periodicals. —

For note discussing the exclusionary rule in probation revocation hearings in light of *State v. Lombardo*, 306 N.C. 594, 295 S.E.2d 399 (1982), see 19 Wake Forest L. Rev. 845 (1983).

For note discussing the use of deadly force to arrest as an unreasonable search and seizure, see 65 N.C.L. Rev. 155 (1986).

CASE NOTES

I. GENERAL CONSIDERATION.

It was not necessary to read defendant the Miranda rights in order to make lawful arrest, where defendant was advised by the arresting officers that he was being arrested on a charge of rape in compliance with subsection (c)(2)(c). *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985).

Applied in *State v. Bethea*, 71 N.C. App. 125, 321 S.E.2d 520 (1984); *Annie Penn Mem. Hosp. v. Caswell County*, 72 N.C. App. 197, 323 S.E.2d 487 (1984); *State v. Grady*, 73 N.C. App. 452, 326 S.E.2d 126 (1985).

Quoted in *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

Cited in *State v. Primes*, 314 N.C. 202, 333 S.E.2d 278 (1985); *State v. Alston*, 82 N.C. App. 372, 346 S.E.2d 184 (1986).

II. WARRANT NOT IN POSSESSION OF OFFICER.

Service of Warrants after Request for Attorney. — When a defendant is arrested pursuant to an arrest warrant, subdivision (a)(2) of this section requires the arrest warrant to be served upon the defendant as soon as possible. The fact that delivery and reading of warrants was made after defendant's request for an attorney did not alter the routineness

of such delivery, nor did it constitute the initiation of questioning. *State v. Underwood*, — N.C. App. —, 352 S.E.2d 898 (1987).

III. ARREST WITHOUT WARRANT.

A. In General.

"Probable Cause" Defined. —

In accord with 2nd paragraph in original. See *State v. Thompson*, 313 N.C. 157, 326 S.E.2d 19 (1985).

One does not have probable cause unless he has information of facts which, if submitted to a magistrate, would require the issuance of an arrest warrant. *State v. Thompson*, 313 N.C. 157, 326 S.E.2d 19 (1985).

Existence of probable cause, etc. —

In accord with original. See *State v. Thompson*, — N.C. —, 326 S.E.2d 19 (1985).

And Is Determined by Factual, etc. —

In accord with original. See *State v. Thompson*, — N.C. —, 326 S.E.2d 19 (1985).

To establish probable cause, etc. —

In accord with 1st paragraph in original. See *State v. Hart*, 64 N.C. App. 699, 308 S.E.2d 474 (1983); *State v. Thompson*, — N.C. —, 326 S.E.2d 19 (1985).

Arresting Officer May Act on Information Supplied by Others. — It is elemental that an arresting officer may act on information supplied by others relating that a felony has been committed and describing the suspected felon. Although the arresting officers may not have had personal knowledge of all the facts justifying arrest, probable cause can be imputed from one officer to others

acting at his request. *State v. Hart*, 64 N.C. App. 699, 308 S.E.2d 474 (1983).

Information Given, etc. —

Knowledge of police officers that an informant had told one of them that he had heard defendant discuss a robbery gave them probable cause to believe defendant had committed a felony, and they could therefore arrest him without a warrant. *State v. White*, 68 N.C. App. 671, 316 S.E.2d 112 (1984).

B. Illustrated Cases.

2. Offense Out of Presence of Officer.

Drunken Driving. —

Editor's Note. — The case notes derived from the cases of *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971) and *State v. Eubanks*, 283 N.C. 556, 196 S.E.2d 706 (1973), rehearing denied, 285 N.C. 597 (1974), appearing under this catchline in the main volume, should be deleted.

Where, based upon his own observation, officer had probable cause to believe that defendant was intoxicated, and based upon statement of security guard, officer also had probable cause to believe that defendant had driven in that intoxicated state, and further, as defendant's car was nearby, knowing that defendant had come and gone once already, the officer had probable cause to believe that defendant would get back in his car and drive in an intoxicated condition, defendant's arrest was entirely proper and legal. *State v. White*, 84 N.C. App. 111, 351 S.E.2d 828, cert. denied, — N.C. —, 353 S.E.2d 404 (1987).

§ 15A-402. Territorial jurisdiction of officers to make arrests.

(f) **Campus Police Officers, Immediate and Continuous Flight.** — A campus police officer may arrest a person outside his territorial jurisdiction when the person arrested has committed a criminal offense within the territorial jurisdiction, for which the officer could have arrested the person within that territory, and the arrest is made during such person's immediate and continuous flight from that territory. (1935, c. 204; 1973, c. 1286, s. 1; 1987, c. 671, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Local Modification. — Gaston County: 1985 (Reg. Sess., 1986), c. 836, s. 1.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added subsection (f).

§ 15A-404. Detention of offenders by private persons.

CASE NOTES

Instruction on Reasonableness. — Defendant was entitled to requested instruction concerning the reasonableness of his armed detention of homicide victim only if there was evidence that: (1) defendant had probable cause to believe that one or more of the crimes enumerated in subsection (b) of this section had been committed; (2) defendant was trying to “detain” the offender until the po-

lice arrived; and (3) the manner of detention was reasonable under the circumstances. *State v. Ataei-Kachuei*, 68 N.C. App. 209, 314 S.E.2d 751, cert. denied, 311 N.C. 763, 321 S.E.2d 146 (1984).

Applied in *State v. Gilliam*, 71 N.C. App. 83, 321 S.E.2d 553 (1984).

SUBCHAPTER V. CUSTODY.

ARTICLE 23.

Police Processing and Duties upon Arrest.

§ 15A-501. Police processing and duties upon arrest generally.

CASE NOTES

I. GENERAL CONSIDERATION. 308 S.E.2d 252 (1983); *State v. Gilbert*, — N.C. App. —, 355 S.E.2d 261 (1987).
Cited in *State v. Webb*, 309 N.C. 549,

§ 15A-504. Return of released person.

(c) Nothing in this section shall be construed to supersede the provisions of G.S. 122C-301. (1981, c. 928; 1987, c. 282, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987

amendment, effective June 4, 1987, substituted “G.S. 122C-301” for “G.S. 122-65.11” at the end of subsection (c).

ARTICLE 24.

Initial Appearance.

§ 15A-511. Initial appearance.

CASE NOTES

Statute Does Not Prescribe, etc. — This section does not prescribe mandatory procedures affecting the validity of a trial. For a violation of this section to be substantial, defendant must show

that the delay in some way prejudiced him, for example, by causing a violation of his constitutional rights, or by resulting in a confession that would not have been obtained but for the delay. *State v.*

Martin, 315 N.C. 667, 340 S.E.2d 326 (1986), involving a delay of less than two hours.

D.U.I. Cases — Effect of Denial of Access or Unwarranted Detention.

— While a defendant charged with an offense under § 20-138.1 might be prejudiced by a denial of access or unwarranted detention, at the very least, such defendant must show that lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost as a result of the statutory deprivations of which he complains. *State v. Knoll*, — N.C. App. —, 352 S.E.2d 463 (1987).

Because of the change in North Carolina's driving while intoxicated laws which occurred in 1973 when former § 20-138 was repealed and § 20-138.1 was enacted, denial of access is no longer inherently prejudicial to a defendant's ability to gather evidence in support of his innocence in every driving while impaired case. Prejudice may or may not occur, since a chemical analysis result of 0.10 or more is sufficient, on its face, to convict. *State v. Knoll*, — N.C. App. —, 352 S.E.2d 463 (1987).

Same — Failure to Inform Defendant of Pretrial Release Conditions.

— Where magistrate failed to inform de-

fendant, who had been arrested on a charge of driving with an alcohol concentration of 0.10 or more, of the general circumstances under which he could secure pretrial release as required by subsection (b) of this section, and failed to determine conditions of pretrial release in accordance with §§ 15A-533(b) and 15A-534(c), such that, but for these statutory deprivations, defendant could have secured release from jail and access to friends and family, defendant was substantially deprived of his statutory rights. However, the trial court erred in finding that defendant's case was irreparably prejudiced by this substantial deprivation of his statutory rights and that thus the only appropriate remedy was dismissal of the charge against defendant, as the evidence was inadequate to support this finding. *State v. Knoll*, — N.C. App. —, 352 S.E.2d 463 (1987).

Statutory violations by magistrate, who failed to inform defendant of his rights to pretrial release under either the general provisions of this section or the more specific provisions of § 15A-534.2, did not justify dismissal of driving while impaired charges. *State v. Gilbert*, — N.C. App. —, 355 S.E.2d 261 (1987).

Applied in *State v. Williams*, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

ARTICLE 26.

Bail.

§ 15A-531. Definitions.

CASE NOTES

Proper for Sentence to Reflect that Defendant on Pretrial Release When Crime Convicted. — Whether or not one on pretrial release on another felony charge is in fact guilty, it is to be expected that he would, while the question of his guilt is pending, be particularly cautious to avoid commission of another criminal offense. If he is not and is convicted of another offense, his status as a pretrial releasee in a pending case is a legitimate circumstance to be considered

in imposing sentence. The legislature may constitutionally require that it be considered. One demonstrates disdain for the law by committing an offense while on release pending trial of an earlier charge, and this may indeed be considered an aggravating circumstance. *State v. Webb*, 309 N.C. 549, 308 S.E.2d 252 (1983).

Applied in *State v. Cronauer*, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-533. Right to pretrial release in capital and noncapital cases.

CASE NOTES

D.U.I. Cases — Effect of Denial of Access or Unwarranted Detention.

— While a defendant charged with an offense under § 20-138.1 might be prejudiced by a denial of access or unwarranted detention, at the very least, such defendant must show that lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost as a result of the statutory deprivations of which he complains. *State v. Knoll*, — N.C. App. —, 352 S.E.2d 463 (1987).

Because of the change in North Carolina's driving while intoxicated laws which occurred in 1973 when former § 20-138 was repealed and § 20-138.1 was enacted, denial of access is no longer inherently prejudicial to a defendant's ability to gather evidence in support of his innocence in every driving while impaired case. Prejudice may or may not occur, since a chemical analysis result of 0.10 or more is sufficient, on its face, to convict. *State v. Knoll*, — N.C. App. —, 352 S.E.2d 463 (1987).

Same — Failure to Determine Conditions of Pretrial Release.

— Where magistrate failed to inform defendant, who had been arrested on a charge of driving with an alcohol concentration of 0.10 or more, of the general circumstances under which he could secure pretrial release as required by § 15A-511(b) and failed to determine conditions of pretrial release in accordance with § 15A-533(b) and Subsection (c) of this section, such that, but for these statutory deprivations, defendant could have secured release from jail and access to friends and family, defendant was substantially deprived of his statutory rights. However, the trial court erred in finding that defendant's case was irreparably prejudiced by this substantial deprivation of his statutory rights and that thus the only appropriate remedy was dismissal of the charge against defendant, as the evidence was inadequate to support this finding. *State v. Knoll*, — N.C. App. —, 352 S.E.2d 463 (1987).

§ 15A-534. Procedure for determining conditions of pretrial release.

(b) The judicial official in granting pretrial release must impose condition (1), (2), or (3) in subsection (a) above unless he determines that such release will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses. Upon making the determination, the judicial official must then impose condition (4) in subsection (a) above instead of condition (1), (2), or (3), and must record the reasons for so doing in writing to the extent provided in the policies or requirements issued by the senior resident superior court judge pursuant to G.S. 15A-535(a).

(1973, c. 1286, s. 1; 1975, c. 166, s. 13; 1977, 2nd Sess., c. 1134, s. 5; 1987, c. 481, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added "and must record the reasons for

so doing in writing to the extent provided in the policies or requirements issued by the senior resident superior court judge pursuant to G.S. 15A-535(a)" at the end of the last sentence of subsection (b).

CASE NOTES

Modification of Pretrial Release Orders. — After a case is before the superior court, a superior court judge may modify the pretrial release order of a magistrate, clerk or district court judge or any such order entered by him at any time before defendant's guilt has been established in superior court. Section 15A-536 imposes additional restrictions upon the modification of pretrial release orders after a defendant has been convicted in superior court. *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

Increase in Bond during Trial. — Where, during trial, the trial judge noted defendant's misconduct in the presence of jurors and the court, and he was aware that defendant faced serious punishment if convicted and that defendant had just lost the aid of one of his prime witnesses, and in light of these circumstances, the court expressed doubt as to the sufficiency of the bond to bring defendant to court until a final determination of his guilt or innocence, the trial judge did not err by increasing defendant's bond during the course of the trial. *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

Commitment of Defendant during Trial. — In addition to modification of a bail bond, a trial judge has discretionary power to order a defendant taken into custody during the progress of a trial. *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

D.U.I. Cases — Effect of Denial of Access or Unwarranted Detention. — While a defendant charged with an offense under § 20-138.1 might be prejudiced by a denial of access or unwarranted detention, at the very least, such defendant must show that lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost as a result of

the statutory deprivations of which he complains. *State v. Knoll*, — N.C. App. —, 352 S.E.2d 463 (1987).

Because of the change in North Carolina's driving while intoxicated laws which occurred in 1973 when former § 20-138 was repealed and § 20-138.1 was enacted, denial of access is no longer inherently prejudicial to a defendant's ability to gather evidence in support of his innocence in every driving while impaired case. Prejudice may or may not occur, since a chemical analysis result of 0.10 or more is sufficient, on its face, to convict. *State v. Knoll*, — N.C. App. —, 352 S.E.2d 463 (1987).

Same — Failure to Determine Conditions of Pretrial Release. — Where magistrate failed to inform defendant, who had been arrested on a charge of driving with an alcohol concentration of 0.10 or more, of the general circumstances under which he could secure pretrial release as required by § 15A-511(b) and failed to determine conditions of pretrial release in accordance with Subsection (b) of this section and § 15A-534(c), such that, but for these statutory deprivations, defendant could have secured release from jail and access to friends and family, defendant was substantially deprived of his statutory rights. However, the trial court erred in finding that defendant's case was irreparably prejudiced by this substantial deprivation of his statutory rights and that thus the only appropriate remedy was dismissal of the charge against defendant, as the evidence was inadequate to support this finding. *State v. Knoll*, —, N.C. App. —, 352 S.E.2d 463 (1987).

Applied in *State v. Cronauer*, 65 N.C. App. 449, 310 S.E.2d 78 (1983); *State v. Jefferson*, 68 N.C. App. 725, 315 S.E.2d 744 (1984).

Stated in *State v. Gilbert*, — N.C. App. —, 355 S.E.2d 261 (1987).

§ 15A-534.2. Detention of impaired drivers.

CASE NOTES

Effect of Magistrate's Failure to Inform of Rights to Pretrial Release. — Statutory violations by magistrate, who failed to inform defendant of his rights to pretrial release under either the general provisions of § 15A-511 or the more

specific provisions of § 15A-534.2, did not justify dismissal of driving while impaired charges. *State v. Gilbert*, — N.C. App. —, 355 S.E.2d 261 (1987).

Applied in *State ex rel. Edmisten v.*

Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

§ 15A-535. Issuance of policies on pretrial release.

(a) Subject to the provisions of this Article, the senior resident superior court judge of each judicial district in consultation with the chief district court judge must devise and issue recommended policies to be followed within the district in determining whether, and upon what conditions, a defendant may be released before trial, and may include in such policies, or issue separately, a requirement that each judicial official who imposes condition (4) in G.S. 15A-534(a) must record the reasons for doing so in writing.

(1973, c. 1286, s. 1; 1975, c. 791, s. 1; 1987, c. 481, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added "and may include in such policies,

or issue separately, a requirement that each judicial official who imposes condition (4) in G.S. 15A-534(a) must record the reasons for doing so in writing" at the end of subsection (a).

§ 15A-536. Release after conviction in the superior court.

CASE NOTES

Grant or Denial of Bail, etc. —

The terms of defendant's release pending appeal are within the discretion of the court. *State v. Crabtree*, 66 N.C. App. 662, 312 S.E.2d 219 (1984).

Modification of Pretrial Release Orders. — After a case is before the superior court, a superior court judge may modify the pretrial release order of a magistrate, clerk or district court judge

or any such order entered by him at any time before defendant's guilt has been established in superior court. This section imposes additional restrictions upon the modification of pretrial release orders after a defendant has been convicted in superior court. *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

Applied in *In re Paul*, — N.C. App. —, 353 S.E.2d 254 (1987).

§ 15A-541. Persons prohibited from becoming surety.

CASE NOTES

As to the rationale behind the prohibition of this section, see *State v. Rogers*, 68 N.C. App. 358, 315 S.E.2d 492, cert. denied, 311 N.C. 767, 319 S.E.2d 284 (1984), appeal dismissed, 469 U.S. 1101, 105 S. Ct. 769, 83 L. Ed. 2d 766 (1985).

The mental state required under this section is nothing more than the general intent to do the proscribed act;

that is, for the attorney to intend or knowingly to become surety on a bail bond for any person other than a member of the attorney's immediate family. *State v. Rogers*, 68 N.C. App. 358, 315 S.E.2d 492, cert. denied, 311 N.C. 767, 319 S.E.2d 284 (1984), appeal dismissed, 469 U.S. 1101, 105 S. Ct. 769, 83 L. Ed. 2d 766 (1985).

§ 15A-544. Forfeiture.

(b) If the principal does not comply with the conditions of the bail bond, the court having jurisdiction must enter an order declaring the bail to be forfeited. If forfeiture is ordered by the court, a copy of the order of forfeiture and notice that judgment will be entered upon the order after 60 days must be served on each obligor. Service is to be made by the sheriff by delivery of the order and notice to him or by delivery at his dwelling house or place of abode with some person of suitable age and discretion residing therein. If the sheriff is unable to effect service because an obligor cannot be found or has no dwelling house or place of abode known to the sheriff, he must file a return to this effect; the clerk must then mail a copy of the order of forfeiture and notice to the obligor at his address of record and note on the original the date of mailing. Service is complete three days after the mailing.

(c) If the principal does not appear before the court having jurisdiction within 60 days of the date of service, or on the first day of the next session of court commencing more than 60 days after the date of service, and satisfy the court that his appearance on the date set was impossible or that his failure to appear was without his fault, the court must enter judgment for the State against the principal and his sureties for the amount of the bail and the costs of the proceedings. If the principal appears within the time allowed following the date of service and satisfies the court that his appearance on the date set was impossible or that his failure to appear was without his fault, the order of forfeiture must be set aside. If the principal appears but is unable to satisfy the court that his appearance on the date set was impossible or that his failure to appear was without his fault, but the court determines that justice does not require the forfeiture of the full amount of the bond, the court may enter judgment in an amount it considers appropriate.

(d) To facilitate the procedure under this section, the clerk in each county must present a forfeiture roll at the first session of superior court commencing more than 60 days after the entry of any order of forfeiture in either the district or superior court. The forfeiture roll must list the names of all principals as to which forfeiture has been ordered in the county in the past three years and as to which judgments of forfeiture against obligors have not been entered or, if entered, not yet satisfied by execution. In addition, the forfeiture roll must show the amount of the bond ordered forfeited in each case and the names of all sureties liable on each bond.

(1868-9, c. 178, subch. 2, s. 10; Code, s. 1225; Rev., s. 3214; C.S., s. 4582; 1973, c. 1286, s. 1; 1987, c. 321.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987

amendment, effective October 1, 1987, substituted "60 days" for "30 days" in subsections (b), (c) and (d).

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in *State v. Moore*, 64 N.C. App. 516, 307 S.E.2d 834 (1983); *State v. Fonville*, 72 N.C. App. 527, 325 S.E.2d 258 (1985).

II. RELIEF FROM FORFEITURE.

Under subsection (e), etc. —

Since subsection (e) of this section says "may" remit, the decision to do so or not is a discretionary one. In order to exercise judicial discretion in a manner favorable to a surety, the judge must de-

termine in his discretion that justice requires remission. *State v. Horne*, 68 N.C. App. 480, 315 S.E.2d 321 (1984).

Court's Discretion Not Abused. — Where the facts conclusively showed that defendant was not incarcerated, and there was no evidence of personal sickness or death, the trial court did not abuse its discretion in refusing to recognize the sureties' defense of excusable absence because of defendant's inability to attend court. *State v. Horne*, 68 N.C. App. 480, 315 S.E.2d 321 (1984).

SUBCHAPTER VI. PRELIMINARY PROCEEDINGS.

ARTICLE 29.

First Appearance before District Court Judge.

§ 15A-601. First appearance before a district court judge; right in felony and other cases in original jurisdiction of superior court; consolidation of first appearance before magistrate and before district court judge; first appearance before clerk of superior court.

CASE NOTES

Applied in *State v. Williams*, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

§ 15A-603. Assuring defendant's right to counsel.

CASE NOTES

Section 7A-457 presupposes that a defendant has been informed of his rights and given an opportunity to act on the information as provided in this section. This involves a determination of defendant's indigency and entitlement to court appointed counsel. However, whether or not a defendant is indigent, any waiver must be in accordance with § 7A-457, notwithstanding the limiting language thereof. *State v. Williams*, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

A defendant who appears without counsel at his arraignment must be properly informed of his rights in the manner required by this section. Where the defendant nevertheless wishes to waive counsel, the court must find that this section has been complied with before a valid waiver can be made. *State v. Williams*, 65 N.C. App. 498, 309 S.E.2d 721 (1983).

§ 15A-606. Demand or waiver of probable-cause hearing.

CASE NOTES

Applied in *State v. Beam*, 70 N.C. App. 181, 319 S.E.2d 616 (1984). *Bass*, 77 N.C. App. 110, 334 S.E.2d 779 (1985); *State v. Muncy*, 79 N.C. App.

Cited in *State v. Cronauer*, 65 N.C. App. 449, 310 S.E.2d 78 (1983); *In re* 356, 339 S.E.2d 466 (1986).

ARTICLE 30.

Probable-Cause Hearing.

§ 15A-611. Probable-cause hearing procedure.

CASE NOTES

Cited in *State v. Byrd*, 67 N.C. App. 168, 312 S.E.2d 528 (1984).

§ 15A-612. Disposition of charge on probable-cause hearing.

CASE NOTES

When a finding, etc. —

Under § 15A-701(a1)(3), when a charge is dismissed pursuant to this section as a result of a finding of no probable cause, the computation of time for the purpose of applying the Speedy Trial Act commences with the last of the items listed in § 15A-701(a1)(3) ("arrested, served with criminal process, waived an indictment, or was indicted") relating to the new charge rather than

the original charge. Otherwise, the clearly expressed intent of the Legislature, that no finding made by a judge in a probable cause hearing will preclude the State from instituting a subsequent prosecution for the same offense, would be defeated. *State v. Koberlein*, 309 N.C. 601, 308 S.E.2d 442 (1983).

Applied in *State v. Gross*, 66 N.C. App. 364, 311 S.E.2d 41 (1984).

ARTICLE 31.

The Grand Jury and Its Proceedings.

§ 15A-621. "Grand jury" defined.

Legal Periodicals. — For note examining the development of constitutional protections against race and class discrimination in the selection of jurors and policy considerations associated with ex-

tending these principles to foreman selection procedures, in light of *State v. Cofield*, 77 N.C. App. 699, 336 S.E.2d 439 (1985), see 64 N.C.L. Rev. 1179 (1986).

§ 15A-622. Formation and organization of grand juries; other preliminary matters.

(h) A written petition for convening of grand jury under this section may be filed by the district attorney, with the concurrence of the Attorney General, with the Clerk of the North Carolina Supreme Court. The Chief Justice shall appoint a panel of three judges to determine whether to order the grand jury convened. A grand jury under this section may be convened if the three-judge panel determines that:

- (1) The petition alleges the commission of or a conspiracy to commit a violation of G.S. 90-95(h) or G.S. 90-95.1, any part of which violation or conspiracy occurred in the county where the grand jury sits, and that persons named in the petition have knowledge related to the identity of the perpetrators of those crimes but will not divulge that knowledge voluntarily or that such persons request that they be allowed to testify before the grand jury; and
- (2) The affidavit sets forth facts that establish probable cause to believe that the crimes specified in the petition have been committed and reasonable grounds to suspect that the persons named in the petition have knowledge related to the identity of the perpetrators of those crimes.

The affidavit shall be based upon personal knowledge or, if the source of the information and basis for the belief are stated, upon information and belief. The panel's order convening the grand jury as an investigative grand jury shall direct the grand jury to investigate the crimes and persons named in the petition, and shall be filed with the Clerk of the North Carolina Supreme Court. A grand jury so convened retains all powers, duties, and responsibilities of a grand jury under this Article. The contents of the petition and the affidavit shall not be disclosed. Upon receiving a petition under this subsection, the Chief Justice shall appoint a panel to determine whether the grand jury should be convened as an investigative grand jury. (1779, c. 157, s. 11, P.R.; R.C., c. 31, s. 33; 1879, c. 12; Code, ss. 404, 1742; Rev., ss. 1969, 1971; C.S., ss. 2333, 2336; 1929, c. 228; 1967, c. 218, s. 1; 1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1977, c. 711, s. 24; 1979, c. 177, s. 1; 1981, c. 440, s. 1; 1985 (Reg. Sess., 1986), c. 843, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 843, s. 6 provides that the act shall become effective October 1, 1986, and shall expire October 1, 1988, but that the expiration date shall not affect the term or authority of a grand jury constituted at that time.

Effect of Amendments. — The 1985

(Reg. Sess., 1986) amendment, effective October 1, 1986, added subsection (h).

Legal Periodicals. — For note examining the development of constitutional protections against race and class discrimination in the selection of jurors and policy considerations associated with extending these principles to foreman selection procedures, in light of *State v. Cofield*, 77 N.C. App. 699, 336 S.E.2d 439 (1985), see 64 N.C.L. Rev. 1179 (1986).

CASE NOTES

**II. DISCRIMINATION IN
SELECTING JURORS.**

Role of the foreman of a North Carolina grand jury is not so significant to the administration of justice that discrimination in the appointment of that

office impugns the fundamental fairness of the process itself so as to undermine the integrity of the indictment. *State v. Gary*, 78 N.C. App. 29, 337 S.E.2d 70 (1985), cert. denied, — N.C. —, 341 S.E.2d 586 (1986).

§ 15A-623. Grand jury proceedings and operation in general.

(h) If a grand jury is convened pursuant to G.S. 15A-622(h), notwithstanding subsection (d) of this section, a prosecutor shall be present to examine witnesses, and a court reporter shall be present and record the examination of witnesses. If the prosecutor determines that it is necessary to compel testimony from the witness, he may grant use immunity to the witness. The grant of use immunity shall be given to the witness in writing by the prosecutor and shall be signed by the prosecutor. The written grant of use immunity shall also be read into the record by the prosecutor and shall include an explanation of use immunity as provided in G.S. 15A-1051. A witness shall have the right to leave the grand jury room to consult with his counsel at reasonable intervals and for a reasonable period of time upon the request of the witness. Notwithstanding subsection (e) of this section, the record of the examination of witnesses shall be made available to the examining prosecutor, and he may disclose contents of the record to other investigative or law-enforcement officers to the extent that the disclosure is appropriate to the proper performance of his official duties. The record of the examination of a witness may be used in a trial to corroborate or impeach that witness to the extent that it is relevant and otherwise admissible. Further disclosure of grand jury proceedings convened pursuant to this act may be made upon written order of a superior court judge if the judge determines disclosure is essential:

- (1) To prosecute a witness who appeared before the grand jury for contempt or perjury; or
- (2) To protect a defendant's constitutional rights or statutory rights to discovery pursuant to G.S. 15A-903.

Upon the convening of the investigative grand jury pursuant to approval by the three-judge panel, the district attorney shall subpoena the witnesses. The subpoena shall be served by the investigative grand jury officer, who shall be appointed by the court. The name of the person subpoenaed and the issuance and service of the subpoena shall not be disclosed, except that a witness so subpoenaed may divulge that information. A copy of all subpoenas and other process shall be returned to the Chief Justice or to such member of the three-judge panel as the Chief Justice may designate, to be filed with the Clerk of the North Carolina Supreme Court. The subpoena shall otherwise be subject to the provisions of G.S. 15A-801. When an investigative grand jury has completed its investigation of the crimes alleged in the petition, the investigative functions of the grand jury shall be dissolved and such investigation shall cease. The District Attorney shall file a notice of dissolution of

the investigative functions of the grand jury with the Clerk of the North Carolina Supreme Court. (1973, c. 1286, s. 1; 1985 (Reg. Sess., 1986), c. 843, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 843, s. 6 provides that the act shall become effective October 1, 1986, and shall expire October 1, 1988, but that the expiration date shall not affect the term or authority of a grand jury constituted at that time.

The reference in subsection (h) of this section to "this act" refers to Session Laws 1985 (Reg. Sess., 1986), c. 843, which amended §§ 5A-12, 8-57,

15A-622, and 15A-1051, as well as this section.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, added subsection (h).

Legal Periodicals. —

For note examining the development of constitutional protections against race and class discrimination in the selection of jurors and policy considerations associated with extending these principles to foreman selection procedures, in light of *State v. Cofield*, 77 N.C. App. 699, 336 S.E.2d 439 (1985), see 64 N.C.L. Rev. 1179 (1986).

CASE NOTES

Public Policy Underlying Subsection (e). —

It is against the public policy of this state to allow a defendant to expose the nature of the evidence upon which a true bill was returned; for this reason a defendant is not allowed to cross-examine the witnesses before a grand jury. *State*

v. Jones, — N.C. App. —, 354 S.E.2d 251 (1987).

Applied in *State v. Gary*, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

Cited in *In re Superior Court Order Dated April 8, 1983*, 70 N.C. App. 63, 318 S.E.2d 843 (1984).

§ 15A-624. Grand jury the judge of facts; judge the source of legal advice.

CASE NOTES

Applied in *State v. Gary*, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

§ 15A-626. Who may call witnesses before grand jury; no right to appear without consent of prosecutor or judge.

CASE NOTES

Purpose of subsection (b) of this section is to provide that the clerk only call as witnesses persons whose names appear on the indictment. *State v. McLain*, 64 N.C. App. 571, 307 S.E.2d 769 (1983).

The logical purpose of subsection (b) of this section is not to insure that all wit-

nesses must be called by the clerk. *State v. McLain*, 64 N.C. App. 571, 307 S.E.2d 769 (1983).

Applied in *State v. Gary*, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

Cited in *In re Superior Court Order Dated April 8, 1983*, 70 N.C. App. 63, 318 S.E.2d 843 (1984).

§ 15A-628. Functions of grand jury; record to be kept by clerk.

CASE NOTES

Applied in *State v. Taylor*, 311 N.C. 266, 316 S.E.2d 225 (1984); *State v. Gary*, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

Cited in *State v. Rogers*, 68 N.C. App. 358, 315 S.E.2d 492 (1984); *In re Superior Court Order Dated April 8, 1983*, 70 N.C. App. 63, 318 S.E.2d 843 (1984).

§ 15A-629. Procedure upon finding of not a true bill; release of defendant, etc.; institution of new charge.

CASE NOTES

Cited in *In re Superior Court Order Dated April 8, 1983*, 70 N.C. App. 63, 318 S.E.2d 843 (1984).

§ 15A-630. Notice to defendant of true bill of indictment.

CASE NOTES

Mailing Not Jurisdictional. — There is nothing in this section to indicate that the mailing of the return of indictment is jurisdictional. *State v.*

Williams, 77 N.C. App. 136, 334 S.E.2d 491 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 877 (1986).

§ 15A-631. Grand jury venue.

In the General Court of Justice, the place for returning a presentment or indictment is a matter of venue and not jurisdiction. A grand jury shall have venue to present or indict in any case where the county in which it is sitting has venue for trial pursuant to the laws relating to trial venue. (1985, c. 553, s. 1.)

Editor's Note. — Session Laws 1985, c. 553, ss. 2 and 4 provide that this section is effective upon ratification but does not apply to pending prosecutions.

The act was ratified July 1, 1985.

Section 3 of Session Laws 1985, c. 553 is a severability clause.

CASE NOTES

Under law prior to enactment of this section, grand jury had no jurisdiction to indict defendants for rapes committed in another county. *State v. Flowers*, 318 N.C. 208, 347 S.E.2d 773 (1986).

Place of Indictment Is Matter of Venue, Not Jurisdiction. — The enactment of this section has changed the

common law rule regarding a county's jurisdiction to indict. It states that the place for returning a presentment or indictment is a matter of venue, not jurisdiction. *State v. Brown*, — N.C. App. —, 355 S.E.2d 225 (1987).

Indictment in County Other Than Where Offense Occurred Not a Material Variance. — Where a defendant is

charged with felonious possession of stolen property, and is indicted in one county, and proof of the offense indicates that it occurred in another county, the variance is not material. *State v. Brown*, — N.C. App. —, 355 S.E.2d 225 (1987).

Questions of venue are waived by

the failure to make a pre-trial motion, even if the problem of venue arises from a variance between the indictment and the proof at trial. *State v. Brown*, — N.C. App. —, 355 S.E.2d 225 (1987).

Quoted in *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986).

§§ 15A-632 to 15A-640: Reserved for future codification purposes.

ARTICLE 32.

Indictment and Related Instruments.

§ 15A-641. Indictment and related instruments; definitions of indictment, information, and presentment.

CASE NOTES

Cited in *State v. Rogers*, 68 N.C. App. 358, 315 S.E.2d 492 (1984); *In re King*, 79 N.C. App. 139, 339 S.E.2d 87 (1986).

§ 15A-642. Prosecutions originating in superior court to be upon indictment or information; waiver of indictment.

CASE NOTES

A defendant may waive a defect within an indictment if he does so expressly and intelligently. For example, numerous North Carolina courts have held that an indictment defective for duplicity may be waived by a plea of guilty. *Burgess v. Griffin*, 585 F. Supp. 1564 (W.D.N.C.), *aff'd*, 743 F.2d 1064 (4th Cir. 1984).

Under North Carolina law, an accused may waive a defect within an indictment

if the facts of the case unmistakably indicate that the purpose of the indictment to protect the accused has been accomplished, and that the accused expressly and intelligently waived the defect. *Burgess v. Griffin*, 585 F. Supp. 1564 (W.D.N.C.), *aff'd*, 743 F.2d 1064 (4th Cir. 1984).

Applied in *State v. Ragland*, 80 N.C. App. 496, 342 S.E.2d 532 (1986).

§ 15A-644. Form and content of indictment, information or presentment.

Legal Periodicals. — For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

For note examining the development of constitutional protections against race and class discrimination in the se-

lection of jurors and policy considerations associated with extending these principles to foreman selection procedures, in light of *State v. Cofield*, 77 N.C. App. 699, 336 S.E.2d 439 (1985), see 64 N.C.L. Rev. 1179 (1986).

CASE NOTES

Applied in *State v. Gary*, 78 N.C. App. 29, 337 S.E.2d 70 (1985).

§ 15A-646. Superseding indictments and informations.

CASE NOTES

Stated in *State v. Parker*, 316 N.C. 295, 341 S.E.2d 555 (1986).

Cited in *State v. Dorsett*, 81 N.C. App. 515, 344 S.E.2d 342 (1986).

SUBCHAPTER VII. SPEEDY TRIAL; ATTENDANCE OF DEFENDANTS.

ARTICLE 35.

Speedy Trial.

§ 15A-701. Time limits and exclusions.

(b) The following periods shall be excluded in computing the time within which the trial of a criminal offense must begin:

- (1) Any period of delay resulting from other proceedings concerning the defendant including, but not limited to, delays resulting from:
 - a. A mental or physical examination of the defendant, including all time when he is awaiting or undergoing treatment or examination, or a hearing on his mental or physical capacity; or
 - b. Trials with respect to other charges against the defendant;
 - c. Interlocutory appeals; or
 - d. Hearings on any pretrial motions or the granting or denial of such motions.

The period of delay under this subdivision must include all delay from the time a motion or other event occurs that begins the delay until the time a judge makes a final ruling on the motion or the event causing the delay is finally resolved;

- (2) Any period of delay during which the prosecution is deferred by the prosecutor pursuant to written agreement with the defendant with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct;
- (3) Any period of delay resulting from the absence or unavailability of the defendant or an essential witness for the defendant or the State. For the purpose of this subdivision, a defendant or an essential witness shall be considered
 - a. Absent when his whereabouts are unknown and he is attempting to avoid apprehension or prosecution or

when his whereabouts cannot be determined by due diligence; and

- b. Unavailable when his whereabouts are known but his presence for testifying at the trial cannot be obtained by due diligence or he resists appearing at or being returned for trial;
- (4) Any period of delay resulting from the fact that the defendant is mentally incapacitated or physically unable to stand trial;
- (5) When a charge is dismissed by the prosecutor under the authority of G.S. 15A-931 and afterwards a new indictment or information is filed against the same defendant or the same defendant is arrested or served with criminal process for the same offense, or an offense based on the same act or transaction or on the same series of acts or transactions connected together or constituting parts of a single scheme or plan, any period of delay from the date the initial charge was dismissed to the date the time limits for trial under this section would have commenced to run as to the subsequent charge;
- (6) A period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted;
- (7) Any period of delay resulting from a continuance granted by any judge if the judge granting the continuance finds that the ends of justice served by granting the continuance outweigh the best interests of the public and the defendant in a speedy trial and sets forth in writing in the record of the case the reasons for so finding. A superior court judge must not grant a motion for continuance unless the motion is in writing and he has made written findings as provided in this subdivision.

The factors, among others, which a judge shall consider in determining whether to grant a continuance are as follows:

- a. Whether the failure to grant a continuance would be likely to result in a miscarriage of justice;
- b. Whether the case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution or otherwise, that it is unreasonable to expect adequate preparation within the time limits established by this section;
- c. Repealed by Session Laws 1977, 2nd Sess., c. 1179, s. 6;
- d. Good cause for granting a continuance shall include those instances when the defendant, a witness, or counsel of record has an obligation of service to the State of North Carolina, including service as a member of the General Assembly; and
- e. Whether the case involves physical or sexual child abuse when a victim or witness is under 16 years of age, and whether further delay would have an adverse impact on the well-being of the child.

When a judge grants a continuance pursuant to this subsection, he may specify in his order the period of time which shall be excluded from the time within which the trial of the criminal case must begin.

- (8) Any period of delay occasioned by the venue of the defendant's case being within a county where, due to limited number of court sessions scheduled for the county, the time limitations of this section cannot reasonably be met. A county is conclusively presumed to be a county where, due to the limited number of court sessions scheduled for the county, the applicable time limit specified by this section cannot reasonably be met, if the county has scheduled each year fewer than eight regularly scheduled criminal or mixed weekly sessions of superior court. In any other county, a determination shall be made in each case whether the applicable time limit specified by this section cannot reasonably be met due to the limited number of court sessions scheduled for that county;
- (9) A period of delay resulting from the defendant's being in the custody of a penal or other institution of a jurisdiction other than the jurisdiction in which the criminal offense is to be tried;
- (10) A period of delay when the defendant or his attorney has an obligation of service to the State of North Carolina or to the United States government and the court, with the consent of both the defendant and the State, continues the case for a period of time consistent with that obligation;
- (11) A period of delay from time the prosecutor enters a dismissal with leave for the nonappearance of the defendant until the prosecutor reinstitutes the proceedings pursuant to G.S. 15A-932;
- (12) When a charge is dismissed by a judge other than under G.S. 15A-703 or a finding of no probable cause pursuant to G.S. 15A-612, and afterwards a new indictment or information is filed against the same defendant or the same defendant is arrested or served with criminal process for the same offense, or an offense based on the same act or transaction or on the same series of transactions connected together or constituting parts of a single scheme or plan, any period of delay from the date the initial charge was dismissed to the date the time limits for trial under this section would have commenced to run as to the subsequent charge;
- (13) Any period of delay from the time criminal process is served on a defendant who has previously been called and failed until the time that the district attorney receives notice that the criminal process has been served;
- (14) Any period of delay from the time the defendant has been called and failed in open court until the time that the district attorney receives notice that the criminal process was stricken or was never issued; and
- (15) Any period of delay from the time that a defendant has been returned from court-ordered or -approved hospitalization, treatment, or examination until the time that the district attorney receives notice that the defendant has returned.

(1973, c. 1286, s. 1; 1977, c. 787, s. 1; 1977, 2nd Sess., c. 1179, ss. 1-8; 1979, c. 1018, ss. 1-2A; 1979, 2nd Sess., c. 1317; 1981, c. 626, ss. 1-10; c. 902, ss. 1-3; 1983, c. 571, ss. 1, 3; 1985, c. 603, s. 9; 1987, c. 137.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. —

The 1985 amendment, effective July 4, 1985, added paragraph (b)(7)d.

The 1987 amendment, effective October 1, 1987, added paragraph (b)(7)e. In addition, the amendment deleted "and" at the end of paragraph (b)(7)a, and added "and" at the end of paragraph (b)(7)d.

CASE NOTES

III. Periods Excluded from Time Computation.

F. Discovery.

G. Continuances.

I. GENERAL CONSIDERATION.

Legislative Intent. — It must be assumed that the legislature in enacting the Speedy Trial Act, which includes this section, was aware of the preexisting § 15A-927(c)(2). It must also be assumed that the legislature did not intend to do a vain act. Therefore, it is the court's belief that the provision "right to a speedy trial" found in § 15A-927 refers to the defendant's constitutional right to a speedy trial, not his statutory right. This interpretation allows a harmonious existence between these statutes, and returns discretion to trial courts. *State v. Marlow*, 310 N.C. 507, 313 S.E.2d 532 (1984).

The basic purpose of the Speedy Trial Act is to provide for the efficient administration of justice, which, according to the legislature, is best effectuated through a prompt determination of a criminal defendant's guilt or innocence. The act's delineation of specific time limits and exclusions serves as a guideline for processing cases, and thus provides a technical defense for criminal defendants. This statute is quite distinguishable from a defendant's Sixth Amendment fundamental right to a speedy trial under the United States Constitution, and in no way should it be interpreted as a bar to this constitutional right. *State v. Marlow*, 310 N.C. 507, 313 S.E.2d 532 (1984).

Legislature intended the phrase "whichever occurs last" to have its ordinary meaning and to indicate that, of the triggering events listed in the statute, that event occurring last in fact will trigger the running of the 120-day period within which the defendant must be brought to trial. *State v. Koberlein*, 309 N.C. 601, 308 S.E.2d 442 (1983).

The Speedy Trial Act creates new rights, supplemental to the speedy trial rights existing under the Sixth Amendment of the United States Constitution.

Thus, the terms of the statute control where a motion to dismiss is made pursuant to this article as distinguished from a motion to dismiss based on an alleged denial of constitutional rights to a speedy trial guaranteed by the Sixth Amendment of the United States Constitution. *State v. Jones*, 70 N.C. App. 467, 320 S.E.2d 26 (1984).

When 120-Day Period Triggered. —

In accord with 4th paragraph in the main volume. See *State v. Parker*, 316 N.C. 295, 341 S.E.2d 555 (1986).

Under subdivision (a1)(3) of this section, when a charge is dismissed pursuant to § 15A-612 as a result of a finding of no probable cause, the computation of time for the purpose of applying the Speedy Trial Act commences with the last of the listed items ("arrested, served with criminal process, waived an indictment, or was indicted") relating to the new charge rather than the original charge. Otherwise, the clearly expressed intent of the legislature, that no finding made by a judge in a probable cause hearing will preclude the state from instituting a subsequent prosecution for the same offense, would be defeated. *State v. Koberlein*, 309 N.C. 601, 308 S.E.2d 442 (1983).

The event occurring "last in fact" triggers the running of the 120-day period within which the defendant must be brought to trial. *State v. Washington*, 71 N.C. App. 767, 323 S.E.2d 420 (1984), cert. denied, 315 N.C. 396, 339 S.E.2d 412 (1986).

Postindictment Arrest, Not Indictment, Held to Trigger Time Limit. — Where defendant was indicted and six months later was arrested, the relevant event, for purposes of the 120-day period in subdivisions (a1)(1) and (a1)(3), was his post-indictment arrest, not his indictment. *State v. Koberlein*, 309 N.C. 601, 308 S.E.2d 442 (1983).

No Maximum Outer Time Limit. — Neither the Supreme Court, Court of

Appeals, nor the Legislature has established a maximum outer limit within which a case must be tried in order to comply with a defendant's statutory right to speedy trial. *State v. White*, 77 N.C. App. 45, 334 S.E.2d 786, cert. denied, 315 N.C. 190, 337 S.E.2d 864 (1985).

Reindictment Following Dismissal of Indictment with Leave. — Where no criminal proceedings took place during the period from Aug. 14, 1984, when indictment against defendant was dismissed under § 15A-931 "with leave" until new indictment on July 22, 1985, and defendant was not subject to prosecutorial control, the dismissal was proper and terminated all proceedings against the defendant, even though defendant's bail bond was not discharged. Thus, the reindictment and trial of defendant did not violate the Speedy Trial Act. *State v. Lamb*, — N.C. App. —, 353 S.E.2d 857 (1987).

Burden on Defendant to Show Prosecutorial Neglect or Willfulness Caused Delay. — The ends of justice afforded by a speedy trial are not best served when speed is placed before thorough and deliberate preparation for trial. The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. *State v. Kilgore*, 65 N.C. App. 331, 308 S.E.2d 876 (1983).

Failure to Challenge Continuance in Proper Manner. — Because § 15A-951 requires actual notice by service of process where a motion is written, ex parte order of continuance issued by one superior court judge may have been voidable, but it was nevertheless not void. It was therefore binding on judge presiding at defendant's trial until defendant attacked it in a proper manner; and defendant could not attack it collaterally by moving under the Speedy Trial Act for dismissal of the charges against him, under a contention that the time excluded by the order should not toll time under the Act because the order was ex parte. *State v. Sams*, 317 N.C. 230, 345 S.E.2d 179 (1986).

Findings of Fact. — While the better practice is for the court to make findings of fact, the court's failure to make findings does not constitute reversible error when it is apparent the court determined the state carried its burden of proof under § 15A-703(a). *State v. Waller*, 77 N.C. App. 184, 334 S.E.2d

796 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 886 (1986).

Applied in *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983); *State v. Herald*, 65 N.C. App. 692, 309 S.E.2d 546 (1983); *State v. Bean*, 66 N.C. App. 86, 310 S.E.2d 421 (1984); *State v. Davis*, 66 N.C. App. 137, 310 S.E.2d 424 (1984); *State v. Gross*, 66 N.C. App. 364, 311 S.E.2d 41 (1984); *State v. Smith*, 66 N.C. App. 570, 312 S.E.2d 222 (1984); *State v. Lefever*, 67 N.C. App. 419, 313 S.E.2d 599 (1984); *State v. Jones*, 310 N.C. 716, 314 S.E.2d 529 (1984); *State v. Vereen*, 312 N.C. 499, 324 S.E.2d 250 (1985); *State v. Piccolo*, 72 N.C. App. 455, 325 S.E.2d 507 (1985); *State v. Thompson*, 73 N.C. App. 60, 325 S.E.2d 646 (1985); *State v. Clark*, 73 N.C. App. 277, 326 S.E.2d 637 (1985); *State v. Sturgis*, 74 N.C. App. 188, 328 S.E.2d 456 (1985); *State v. Lyszaj*, 314 N.C. 256, 333 S.E.2d 288 (1985); *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985).

Cited in *State v. Sturgis*, 74 N.C. App. 188, 328 S.E.2d 456 (1985); *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986); *State v. White*, 84 N.C. App. 111, 351 S.E.2d 828 (1987).

III. PERIODS EXCLUDED FROM TIME COMPUTATION.

A. In General.

Crowded Docket. —

The size of the docket in the county and the fact that the State did not act in a willful and neglectful manner in failing to bring the case to trial within the time limit imposed by this article is not an appropriate standard for concluding that subdivision (a1)(4) has been complied with or that noncompliance may be overlooked. *State v. Jones*, 70 N.C. App. 467, 320 S.E.2d 26 (1984).

The mere taking of judicial notice of the size of the docket is not sufficient to support exclusion from computation under this article of any specific period of delay. Some factual basis in the record for a determination that the case could not reasonably have been tried is also required. *State v. Jones*, 70 N.C. App. 467, 320 S.E.2d 26 (1984).

Time period from calendaring of a case for arraignment to completion of arraignment is properly excluded under subdivision (b)(1) of this section. *State v. Herbin*, 64 N.C. App. 711, 308 S.E.2d 338 (1983).

The absence of willfulness or negligence is not a criterion for excluding

time periods pursuant to subsection (b). It is error to apply this standard to a determination of a motion to dismiss pursuant to the Speedy Trial Act. *State v. Jones*, 70 N.C. App. 467, 320 S.E.2d 26 (1984).

Court's reference to grounds stated in motion for continuance is a sufficient recitation of its reasons for making the finding which subdivision (b)(7) of this section requires in order to exclude delays occasioned by the granting of a continuance. *State v. Heath*, 77 N.C. App. 264, 335 S.E.2d 350 (1985), rev'd on other grounds, — N.C. —, 341 S.E.2d 565 (1986).

F. Discovery.

A defendant may petition the court to declare a specific time, place and manner for completing discovery. If the defendant pursues this available course of action, then, of course, the statutory time begins to run again upon the court ordered date of compliance. *State*

v. Marlow, 310 N.C. 507, 313 S.E.2d 532 (1984).

Exclusion of discovery time does not force the defendant to anxiously await, at the mercy of the State, the completion of discovery within a reasonable time. The State remains bound not only by requirements of good faith to proceed in a timely manner, but also by the defendant's ability to compel earlier discovery, pursuant to § 15A-909. *State v. Marlow*, 310 N.C. 507, 313 S.E.2d 532 (1984).

G. Continuances.

Burden of Justifying Periods Excluded. — Once a defendant shows that the 120-day period under the Speedy Trial Act has been exceeded, the state must assume the burden of justifying periods it contends were properly excluded. *State v. White*, 77 N.C. App. 45, 334 S.E.2d 786, cert. denied, 315 N.C. 190, 337 S.E.2d 864 (1985).

§ 15A-702. Counties with limited court sessions.

CASE NOTES

Discretion of Court. — An order that the defendant's case be brought to trial within not less than 30 days is discretionary with the trial court. *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748

(1985), cert. denied, 315 N.C. 392, 338 S.E.2d 881 (1986).

Applied in *State v. Davis*, 66 N.C. App. 137, 310 S.E.2d 424 (1984).

§ 15A-703. Sanctions.

CASE NOTES

Factors to Be Considered, etc. —

This section leaves in the discretion of the trial court the determination of whether dismissal should be with or without prejudice. It mandates, however, that the court consider each of the factors set forth in making that determination. Thus, failure to establish in the record that the court has considered each of these factors, and to establish its conclusions with regard to each, may leave the reviewing court no choice but to find an abuse of discretion. Trial courts should detail for the record findings of fact and conclusions therefrom demonstrating compliance with the mandate of this section. *State v. Smith*, 70 N.C. App. 293, 319 S.E.2d 647 (1984).

Findings of Fact. — While the better

practice is for the court to make findings of fact, the court's failure to make findings does not constitute reversible error when it is apparent the court determined the State carried its burden of proof under subsection (a). *State v. Waller*, 77 N.C. App. 184, 334 S.E.2d 796 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 886 (1986).

Failure to Challenge Continuance in Proper Manner. — Because § 15A-951 requires actual notice by service of process where a motion is written, ex parte order of continuance issued by one superior court judge may have been voidable, but it was nevertheless not void. It was therefore binding on judge presiding at defendant's trial until defendant attacked it in a proper man-

ner; and defendant could not attack it collaterally by moving under the Speedy Trial Act for dismissal of the charges against him, under a contention that the time excluded by the order should not toll time under the Act because the order was ex parte. *State v. Sams*, 317 N.C. 230, 345 S.E.2d 179 (1986).

Applied in *State v. Koberlein*, 309 N.C. 601, 308 S.E.2d 442 (1983); *State v. Herbin*, 64 N.C. App. 711, 308 S.E.2d 338 (1983); *State v. Davis*, 66 N.C. App. 137, 310 S.E.2d 424 (1984); *State v. Gross*, 66 N.C. App. 364, 311 S.E.2d 41

(1984); *State v. Marlow*, 310 N.C. 507, 313 S.E.2d 532 (1984); *State v. Jones*, 70 N.C. App. 467, 320 S.E.2d 26 (1984); *State v. Washington*, 71 N.C. App. 767, 323 S.E.2d 420 (1984); *State v. Parker*, 76 N.C. App. 508, 333 S.E.2d 551 (1985); *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985).

Cited in *State v. Smith*, 66 N.C. App. 570, 312 S.E.2d 222 (1984); *State v. Sturgis*, 74 N.C. App. 188, 328 S.E.2d 456 (1985); *State v. White*, 84 N.C. App. 111, 351 S.E.2d 828 (1987).

§ 15A-704. No bar to claim of denial of speedy trial.

CASE NOTES

The basic purpose of the Speedy Trial Act is to provide for the efficient administration of justice, which, according to the Legislature, is best effectuated through a prompt determination of a criminal defendant's guilt or innocence. The act's delineation of specific time limits and exclusions serves as a guideline for processing cases, and thus provides a technical defense for criminal

defendants. This statute is quite distinguishable from a defendant's Sixth Amendment fundamental right to a speedy trial under the United States Constitution, and in no way should it be interpreted as a bar to this constitutional right. *State v. Marlow*, 310 N.C. 507, 313 S.E.2d 532 (1984).

ARTICLE 36.

Special Criminal Process for Attendance of Defendants.

§ 15A-711. Securing attendance of criminal defendants confined in institutions within the State; requiring prosecutor to proceed.

CASE NOTES

Filing Requirement Not Waived by Statement in Handbook for Inmates.

— Where the defendant did not comply with subsection (c), by serving a copy of his request for trial on the prosecutor in the manner provided by § 1A-1, Rule 5(b), he was not entitled to have his case dismissed under this section. The State did not waive the provisions of subsection (c) by the issuance of a handbook by

the North Carolina Department of Corrections which instructed inmates that they had to file the request for a trial only with the clerk of superior court. *State v. Hege*, 78 N.C. App. 435, 337 S.E.2d 130 (1985).

Applied in *State v. Davis*, 66 N.C. App. 137, 310 S.E.2d 424 (1984).

ARTICLE 37.

*Uniform Criminal Extradition Act.***§ 15A-722. Duty of Governor as to fugitives from justice of other states.**

CASE NOTES

The necessity for a Governor's warrant is a procedural requirement for proceedings under the Uniform Criminal Extradition Act and is expressly exempted as a procedural right in proceedings under the Interstate

Agreement on Detainers (see § 15A-761 Article IV(d)). In re Morris, 563 F. Supp. 1289 (W.D.N.C.), certificate of probable cause denied and dismissed, 718 F.2d 1092 (4th Cir. 1983).

§ 15A-733. Arrest prior to requisition.

CASE NOTES

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-735. Commitment to await requisition; bail.

CASE NOTES

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-736. Bail in certain cases; conditions of bond.

CASE NOTES

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-738. Forfeiture of bail.

CASE NOTES

Applied in State v. Cronauer, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

§ 15A-740. Guilt or innocence of accused, when inquired into.

CASE NOTES

Applied in *State v. Cronauer*, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

ARTICLE 38.

Interstate Agreement on Detainers.

§ 15A-761. Agreement on Detainers entered into; form and contents.

CASE NOTES

Agreement clearly relates only to those charges which are the basis for the issuance of the detainer. *State v. Parr*, 65 N.C. App. 415, 308 S.E.2d 881 (1983).

The necessity for a Governor's warrant is a procedural requirement for proceedings under the Uniform Criminal Extradition Act and is expressly exempted as a procedural right

in proceedings under Article IV(d) of this section. In *re Morris*, 563 F. Supp. 1289 (W.D.N.C.), certificate of probable cause denied and dismissed, 718 F.2d 1092 (4th Cir. 1983).

Applied in *State v. Lyszaj*, 314 N.C. 256, 333 S.E.2d 288 (1985).

Cited in *State v. Dorsett*, 81 N.C. App. 515, 344 S.E.2d 342 (1986).

SUBCHAPTER VIII. ATTENDANCE OF WITNESSES; DEPOSITIONS.

ARTICLE 42.

Attendance of Witnesses Generally.

§ 15A-803. Attendance of witnesses.

CASE NOTES

Discretion of Court. —

A trial judge may not exercise his discretion to issue an order to secure the attendance of a material witness in a manner inconsistent with the Sixth Amendment guarantee that an accused be afforded compulsory process for obtaining witnesses in his favor. *State v. Coen*, 78 N.C. App. 778, 338 S.E.2d 784 (1986).

The trial court did not abuse its

discretion and did not violate defendant's right to compulsory process in denying motion to issue an order under subsection (d) of this section, where defense counsel was dilatory in advising the court of any problem he was having with witness. *State v. Coen*, 78 N.C. App. 778, 338 S.E.2d 784 (1986).

Applied in *State v. Poindexter*, 69 N.C. App. 691, 318 S.E.2d 329 (1984).

§ 15A-805. Securing attendance of witnesses confined in institutions within the State.

CASE NOTES

This section does not require that affidavits be submitted to show the good cause; neither must a witness have testified in a previous trial in order to be subject to production as a witness for any other given trial. However, a trial judge has the duty to supervise and

control the course and conduct of a trial, and in order to discharge that duty he is invested with broad discretionary powers. *State v. Rankin*, 312 N.C. 592, 324 S.E.2d 224 (1985).

Applied in *State v. Jackson*, 64 N.C. App. 715, 308 S.E.2d 360 (1983).

ARTICLE 44.

Securing Attendance of Prisoners as Witnesses.

§ 15A-823. Securing attendance of prisoner in federal institution as witness in proceeding in the State.

CASE NOTES

Applied in *State v. Poindexter*, 69 N.C. App. 691, 318 S.E.2d 329 (1984).

ARTICLE 45.

Fair Treatment for Victims and Witnesses.

§ 15A-824. Definitions.

As used in this Article, unless the context clearly requires otherwise:

- (1) "Crime" means a felony or an act committed by a juvenile that, if committed by a competent adult, would constitute a felony.
- (2) "Family member" means a spouse, child, parent or legal guardian, or the closest living relative.
- (3) "Victim" means a person against whom there is probable cause to believe a crime has been committed.
- (4) "Witness" means a person who has been or is expected to be summoned to testify for the prosecution in a criminal action concerning a felony, or who by reason of having relevant information is subject to being called or is likely to be called as a witness for the prosecution in such an action, whether or not an action or proceeding has been commenced. (1985 (Reg. Sess., 1986), c. 998, s. 1.)

Editor's Note. — Section 5 of Session Laws 1985 (Reg. Sess., 1986), c. 998, makes this Article effective October 1, 1986.

§ 15A-825. Treatment due victims and witnesses.

To the extent reasonably possible and subject to available resources, the employees of law-enforcement agencies, the prosecutorial system, the judicial system, and the correctional system should make a reasonable effort to assure that each victim and witness within their jurisdiction:

- (1) Is provided information regarding immediate medical assistance when needed and is not detained for an unreasonable length of time before having such assistance administered.
 - (2) Is provided information about available protection from harm and threats of harm arising out of cooperation with law-enforcement prosecution efforts, and receives such protection.
 - (3) Has any stolen or other personal property expeditiously returned by law-enforcement agencies when it is no longer needed as evidence, and its return would not impede an investigation or prosecution of the case. When feasible, all such property, except weapons, currency, contraband, property subject to evidentiary analysis, and property whose ownership is disputed, should be photographed and returned to the owner within a reasonable period of time of being recovered by law-enforcement officials.
 - (4) Is provided appropriate employer intercession services to seek the employer's cooperation with the criminal justice system and minimize the employee's loss of pay and other benefits resulting from such cooperation whenever possible.
 - (5) Is provided, whenever practical, a secure waiting area during court proceedings that does not place the victim or witness in close proximity to defendants and families or friends of defendants.
 - (6) Is informed of the procedures to be followed to apply for and receive any appropriate witness fees or victim compensation.
 - (7) Is given the opportunity to be present during the final disposition of the case or is informed of the final disposition of the case, if he has requested to be present or be informed.
 - (8) Is notified, whenever possible, that a court proceeding to which he has been subpoenaed will not occur as scheduled.
 - (9) Has a victim impact statement prepared for consideration by the court.
 - (10) Is informed that civil remedies may be available and that statutes of limitation apply in civil cases.
 - (11) Is notified before a proceeding is held at which the release of the offender from custody is considered, if the crime for which the offender was placed in custody is a Class G or more serious felony.
 - (12) Is notified if the offender escapes from custody or is released from custody, if the crime for which the offender was placed in custody is a Class G or more serious felony.
 - (13) Has family members of a homicide victim offered all the guarantees in this section, except those in subdivision (1).
- (1985 (Reg. Sess., 1986), c. 998, s. 1.)

§ 15A-826. Victim and witness assistants.

Victim and witness assistants are responsible for coordinating efforts within the law-enforcement and judicial systems to assure that each victim and witness is treated in accordance with this Article. (1985 (Reg. Sess., 1986), c. 998, s. 1.)

§ 15A-827. Scope.

This Article does not create any civil or criminal liability on the part of the State of North Carolina or any criminal justice agency, employee, or volunteer. (1985 (Reg. Sess., 1986), c. 998, s. 1.)

§§ 15A-828 to 15A-849: Reserved for future codification purposes.

SUBCHAPTER IX. PRETRIAL PROCEDURE.

ARTICLE 48.

Discovery in the Superior Court.

§ 15A-902. Discovery procedure.

CASE NOTES

Imposition of Sanctions Not Mandated. — Neither §§ 15A-902 to 15A-910 nor the case of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), requires the trial court to impose any sanctions for failure to comply with discovery. *State v. McClintick*, 315 N.C. 649, 340 S.E.2d 41 (1986).

Failure to Impose Sanctions Not Improper. — Where although the trial judge did not impose any sanctions for State's failure to comply with discovery, he expressed his displeasure with State's tactics with respect to discovery, and

employed several of the curative actions suggested by § 15A-910, and at no time did he determine that defendant was not provided items to which he was entitled, that defendant was harmed by the delay in receiving them, that defendant was subjected to unfair surprise at trial, or that State had failed to comply with the law, the court's failure to impose sanctions was not an abuse of discretion. *State v. McClintick*, 315 N.C. 649, 340 S.E.2d 41 (1986).

Applied in *State v. Martin*, 67 N.C. App. 265, 313 S.E.2d 15 (1984).

§ 15A-903. Disclosure of evidence by the State — Information subject to disclosure.

CASE NOTES

I. GENERAL CONSIDERATION.

Subsection (e) of this section replaced former §§ 15-155.4 and 15-155.5, which although similar to the current statute, were more liberal in that they also allowed the defendant to interview prospective expert witnesses.

State v. Jones, — N.C. App. —, 354 S.E.2d 251 (1987).

Common law recognizes, etc. —

In accord with 2nd paragraph in the main volume. See *State v. Newell*, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

Internal police reports, etc. —

To the extent that defendant's discov-

ery motion seeking notes taken or reports made by investigating officers which would tend to exculpate the defendant, mitigate the degree of the offense, or contradict other evidence to be presented by the State sought information beyond that which the State was required to disclose under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), it sought "work product" not subject to discovery. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Sanctions for failure to comply with the discovery procedures are permissive and are imposed in the sound discretion of the trial judge. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

Exclusion Not Automatically Required. — The State's failure to comply with a discovery order pursuant to this section will not automatically require the exclusion of the undisclosed evidence. *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, cert. denied, — U.S. —, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Trial judge did not err by overruling defendant's objection to certain testimony on the ground of failure to comply with this section, where defendant was given timely notice of the substance of the statement, and those portions of the testimony as to which notice was not given related to an explanation of why the witness came forward with the evidence. *State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986).

Error in Failing to Examine Withheld Records to Determine if Material Evidence Withheld. — Where state failed to inform defendant about the existence of PEN register recording calls made by defendant despite defendant's discovery motion and subsequent court order enforcing that motion until well into the trial, the trial court erred in failing to examine the records in camera to determine if material and favorable evidence had been withheld or to seal them for the inspection of the appellate court. *State v. Jones*, — N.C. App. —, 354 S.E.2d 251 (1987).

Applied in *State v. Robinson*, 310 N.C. 530, 313 S.E.2d 571 (1984); *State v. Lefever*, 67 N.C. App. 419, 313 S.E.2d 599 (1984); *State v. Pridgen*, 313 N.C. 80, 326 S.E.2d 618 (1985); *State v. Callahan*, 77 N.C. App. 164, 334 S.E.2d 424 (1985).

Quoted in *State v. Teasley*, 82 N.C. App. 150, 346 S.E.2d 227 (1986).

Cited in *State v. Goldman*, 311 N.C. 338, 317 S.E.2d 361 (1984); *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984); *State v. Beam*, 70 N.C. App. 181, 319 S.E.2d 616 (1984).

II. STATEMENT OF DEFENDANT.

As used in subdivision (a)(2), "substance" means essence; the material or essential part of a thing, as distinguished from form; that which is essential. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Facts and Circumstances Surrounding Statement. — Nothing in this section entitles a defendant to have the trial court order the prosecutor to provide him with a description of the facts and circumstances surrounding his statements. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Subsection (b) of this section is limited to joint trials of codefendants. *State v. Brooks*, 83 N.C. App. 179, 349 S.E.2d 630 (1986).

IV. STATE WITNESSES.

Defendant was not entitled to pre-trial discovery of victim's statements. *State v. Alston*, 81 N.C. App. 459, 344 S.E.2d 339 (1986).

Request for Names of Persons Interviewed or Having Information. — Requests by defendant to have the prosecutor ordered to disclose the "names of all persons known by the State to have information regarding the above-captioned matter and/or all persons interviewed regarding the matter" amounted to a request for a list of the state's witnesses and others having knowledge of the cases against the defendant; such information simply is not discoverable. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Criminal Records of State Witnesses. —

Copies of prior criminal records of any state witness or prospective witness, and any additional information which could reflect on the credibility of such witnesses, is not subject to discovery. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

This section does not grant the defendant the right to discover the names and addresses, let alone the criminal records, of the State's witnesses. *State v. Wingard*, 317 N.C. 590, 346 S.E.2d 638 (1986).

Impeachment value in the victim's statements goes to the weight of the

victim's identification of the defendant rather than to its admissibility. *State v. Jean*, 310 N.C. 157, 311 S.E.2d 266 (1984).

V. DOCUMENTS, TANGIBLE OBJECTS, AND REPORTS.

Meaning of "Within the Possession, Custody, or Control of the State". —

There is no statute that grants a defendant in a criminal trial access as of right to any documents unless they are within the possession, custody or control of the State, which means within the prosecutor's possession, custody or control. *State v. Newell*, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

Subpoena Duces Tecum. — Documents not subject to this section may still be subject to a subpoena duces tecum. *State v. Newell*, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

Independent Chemical Analysis of Seized Substances. — Due process requires that defendants have the opportu-

nity to have an independent chemical analysis performed upon seized substances. *State v. Jones*, — N.C. App. —, 354 S.E.2d 251 (1987), holding that the trial court's refusal to allow defendants further access to drugs did not violate that due process requirement.

Bill of Sale and Odometer Statement. — The court did not err in allowing the State to introduce a document to show that defendant owned car allegedly used in bank robbery, the contents of which had been suppressed by a prior order, where before the trial started the bill of sale and the odometer statement were not within the possession, custody, or control of the State, but when the car dealer arrived in court with the documents they were promptly made available to defendants. Since defendants had no right to learn ahead of time, by discovery, who would testify against them and the substance of their testimony, § 15A-907 was not violated. *State v. Alston*, 80 N.C. App. 540, 342 S.E.2d 573, cert. denied, 317 N.C. 707, 347 S.E.2d 441 (1986).

§ 15A-904. Disclosure of evidence by the State — Certain reports not subject to disclosure.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in *State v. Lefever*, 67 N.C. App. 419, 313 S.E.2d 599 (1984); *State v. Williams*, 71 N.C. App. 136, 321 S.E.2d 561 (1984).

Cited in *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1983).

II. STATE WITNESSES.

But subsection (a) does not bar, etc. —

Under subsection (a) of this section, the State is not required to give to defendant before trial any statements made by witnesses of the State. If such evi-

dence is material and favorable to the defendant, the State is required to disclose it to defense counsel at trial. *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

Impeachment value of victim's statements goes to the weight of the victim's identification of the defendant rather than to its admissibility. *State v. Jean*, 310 N.C. 157, 311 S.E.2d 266 (1984).

Defendant was not entitled to pre-trial discovery of victim's statements. *State v. Alston*, 81 N.C. App. 459, 344 S.E.2d 339 (1986).

§ 15A-905. Disclosure of evidence by the defendant — Information subject to disclosure.

CASE NOTES

Defendant Not Required To Inform State Why Scientific Evidence Not Offered. — In a prosecution for discharging a firearm into an occupied building, since the defendant never intended to introduce his ballistics report or put the preparer of it on the stand, the judge had no authority to require that a copy of the report be sent to the district attorney, as the purpose of subsection (b)

is not to inform the state why scientific evidence will not be offered by the defendant, but to acquaint it with scientific evidence that will be offered during the trial. *State v. King*, 75 N.C. App. 618, 331 S.E.2d 291, cert. denied, 314 N.C. 545, 335 S.E.2d 24, appeal dismissed, 314 N.C. 672, 335 S.E.2d 900 (1985).

Applied in *State v. McMahon*, 67 N.C. App. 181, 312 S.E.2d 526 (1984).

§ 15A-907. Continuing duty to disclose.

CASE NOTES

Section Not Violated. — The court did not err in allowing the State to introduce a document to show that defendant owned car allegedly used in bank robbery, the contents of which had been suppressed by a prior order, where before the trial started the bill of sale and the odometer statement were not within the possession, custody, or control of the State, but when the car dealer arrived in court with the documents they were

promptly made available to defendants. Since defendants had no right to learn ahead of time, by discovery, who would testify against them and the substance of their testimony, this section was not violated. *State v. Alston*, 80 N.C. App. 540, 342 S.E.2d 573, cert. denied, 317 N.C. 707, 347 S.E.2d 441 (1986).

Applied in *State v. Williams*, 71 N.C. App. 136, 321 S.E.2d 561 (1984).

§ 15A-908. Regulation of discovery — Protective orders.

CASE NOTES

Applied in *State v. Beam*, 70 N.C. App. 181, 319 S.E.2d 616 (1984).

§ 15A-909. Regulation of discovery — Time, place, and manner of discovery and inspection.

CASE NOTES

A defendant may petition the court to declare a specific time, place and manner for completing discovery. If the defendant pursues this available course of action, then, of course, the statutory time begins to run again upon the court ordered date of compliance. *State*

v. Marlow, 310 N.C. 507, 313 S.E.2d 532 (1984).

Exclusion of discovery time does not force the defendant to anxiously await, at the mercy of the State, the completion of discovery within a reasonable time. The State remains bound not

only by requirements of good faith to proceed in a timely manner, but also by the defendant's ability to compel earlier

discovery, pursuant to this section. *State v. Marlow*, 310 N.C. 507, 313 S.E.2d 532 (1984).

§ 15A-910. Regulation of discovery — Failure to comply.

CASE NOTES

Clarification was the purpose of the 1983 amendment to this section.

It thus should not be construed to have changed the law so as to permit a previously prohibited sanction, but rather to have made explicit a previously implicit intent that the sanction of dismissal be among those which could be implemented by other appropriate orders. *State v. Adams*, 67 N.C. App. 116, 312 S.E.2d 498 (1984).

Particular Remedy, etc. —

In accord with 1st paragraph in original. See *State v. Taylor*, 311 N.C. 266, 316 S.E.2d 225 (1984); *State v. Herring*, 74 N.C. App. 326, 328 S.E.2d 23, discretionary review denied as to additional issues, 314 N.C. 671, 335 S.E.2d 324 (1985).

Sanctions for failure to comply with the discovery procedures are permissive and are imposed in the sound discretion of the trial judge. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

The decision to employ remedies available under this section is a matter within the discretion of the trial judge and, absent abuse, is not reviewable on appeal. *State v. Martin*, 67 N.C. App. 265, 313 S.E.2d 15, cert. denied and appeal dismissed, 311 N.C. 405, 319 S.E.2d 278 (1984).

While this section provides for several possible curative actions, the trial court is not required to impose any sanctions. *State v. Taylor*, 311 N.C. 266, 316 S.E.2d 225 (1984); *State v. Waller*, 77 N.C. App. 184, 334 S.E.2d

796 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 886 (1986).

And not reviewable on appeal, etc. —

In accord with 1st paragraph in original. See *State v. Taylor*, 311 N.C. 266, 316 S.E.2d 225 (1984). See *State v. Waller*, 77 N.C. App. 184, 334 S.E.2d 796 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 886 (1986).

The choice of which sanction to apply, if any, rests in the sound discretion of the trial court and is not reviewable absent a showing of an abuse of that discretion. *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, cert. denied, — U.S. —, 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Failure to Impose Sanctions Not Improper. — Where although the trial judge did not impose any sanctions for State's failure to comply with discovery, he expressed his displeasure with State's tactics with respect to discovery, and employed several of the curative actions suggested by this section, and at no time did he determine that defendant was not provided items to which he was entitled, that defendant was harmed by the delay in receiving them, that defendant was subjected to unfair surprise at trial, or that State had failed to comply with the law, the court's failure to impose sanctions was not an abuse of discretion. *State v. McClintick*, 315 N.C. 649, 340 S.E.2d 41 (1986).

Applied in *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984).

Cited in *State v. Brooks*, 83 N.C. App. 179, 349 S.E.2d 630 (1986).

ARTICLE 49.

*Pleadings and Joinder.***§ 15A-922. Use of pleadings in misdemeanor cases generally.**

(h) **Allegations in Superior Court of Prior Convictions.** — When charges in the district court involve allegations of prior convictions and there is an appeal to the superior court for trial de novo, a statement of charges must be filed in the superior court to charge the offense in the manner provided in G.S. 15A-928. (1973, c. 1286, s. 1; 1975, c. 166, s. 27; 1979, c. 770; 1985, c. 689, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985

amendment, effective July 11, 1985, substituted "of" for "or" preceding "prior convictions" in subsection (h).

CASE NOTES

Quoted in *State v. Caudill*, 68 N.C. App. 268, 314 S.E.2d 592 (1984).

§ 15A-923. Use of pleadings in felony cases and misdemeanor cases initiated in the superior court division.

CASE NOTES

Term "amendment" in subsection (e), etc. —

In accord with the main volume. See *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

The failure to accurately state the date or time an offense is alleged to have occurred does not invalidate a bill of indictment, nor does it justify reversal of a conviction obtained thereon. *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

The State may prove that an offense charged, etc. —

Ordinarily, the date alleged in the indictment is neither an essential nor a substantial fact, and therefore the State may prove that the offense was actually committed on some date other than that alleged in the indictment, without the necessity of a motion to change the bill. *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

Change of Date on Indictment. — In prosecution for incest, where al-

though the testimony of the young prosecuting witness as to the date of the offense differed from that of her mother, all of the State's evidence showed that the crime, if committed, took place on the Sunday of the weekend during which a certain individual visited the defendant's residence, the change on the indictment of the date of the offense, as permitted by the trial court, did not substantially alter the charge against the defendant, nor did it unfairly surprise him or prevent him from presenting a defense. *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

The State may prove that an offense charged was committed on some date other than the time named in the indictment. A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense. *State v. Price*, 310 N.C. 596, 313 S.E.2d 556 (1984).

§ 15A-924. Contents of pleadings; duplicity; alleging and proving previous convictions; failure to charge crime; surplusage.

CASE NOTES

I. GENERAL CONSIDERATION.

Effect on § 15-144. — North Carolina Const., Art. 1, § 23 and subdivision (a)(5) of this section did not specifically repeal § 15-144, nor did they repeal it by implication. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

It is generally true that indictments need only allege the ultimate facts constituting the elements of the criminal offense. *State v. Singleton*, — N.C. App. —, 354 S.E.2d 259 (1987).

An indictment couched in the language of the statute is generally sufficient to charge the statutory offense. *State v. Singleton*, — N.C. App. —, 354 S.E.2d 259 (1987).

A criminal pleading does not have to state every element of the offense charged, but only facts supporting every element of the offense. *State v. Jordan*, 75 N.C. App. 637, 331 S.E.2d 232, cert. denied, 314 N.C. 544, 335 S.E.2d 23 (1985).

The purpose behind requiring that the county in which the offense took place be alleged is to establish a basis for jurisdiction and venue. *State v. Gardner*, — N.C. App. —, 353 S.E.2d 662 (1987).

Where there was no error in the dates alleged, even if time were of the essence in defendants' case, the charges would not be subject to dismissal under subdivision (a)(4). *State v. Oliver*, — N.C. App. —, 354 S.E.2d 527 (1987).

Specifying Felony in Indictment. — An essential element of kidnapping under § 14-39(a)(2) is that the confinement, restraint or removal be for the purpose of facilitating the commission of any felony or facilitating escape following the commission of a felony. The requirements of subsection (a)(5) are met for the purposes of alleging this element by the allegation in the indictment that the confinement, restraint, or removal was carried out for the purpose of facilitating "a felony" or escape following "a felony". It is not required that the indictment specify the felony referred to in § 14-39(a)(2). *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985).

An indictment alleging that the defendant kidnapped the victim "by unlawfully confining, restraining, or removing her from one place to another without her consent for the purpose of committing a felony . . ." charges the offense in the language of the statute and is sufficient. All of the elements of the crime of kidnapping are clearly alleged in the indictment. The additional "rape or robbery" language in the indictment, following "committing a felony," is mere harmless surplusage and may properly be disregarded in passing upon its validity. *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985).

Indictments for taking indecent liberties held to clearly inform defendant of the conduct which was the subject of the accusations as required by subsection (a)(5), and therefore sufficiently charged the offense, and did not need to specify the exact act which constituted the "immoral, improper and indecent liberty." *State v. Singleton*, — N.C. App. —, 354 S.E.2d 259 (1987).

Indictment charging defendant with crime against nature held sufficient under § 15A-924(a)(5). *State v. Singleton*, — N.C. App. —, 354 S.E.2d 259 (1987).

Unlawful Private Use of Publicly Owned Vehicle. — A misdemeanor statement of charges which, when all surplusage was excluded from consideration, asserted that the defendant was a state employee, that she directed her subordinate to pick up a birthday cake and deliver it to her home, and that she did so with knowledge that her private purpose would be accomplished through the use of a state-owned motor vehicle, was sufficient to support a conviction of unlawful private use of a publicly owned vehicle. *State v. Lilly*, 75 N.C. App. 173, 330 S.E.2d 30 (1985).

In a prosecution for failing to stop at the scene of an accident resulting in property damage, the defendant's knowledge that a collision involving his car had occurred and that property damage had resulted was clearly inferable from the facts, duly alleged under subsection (a)(4), that while the defendant

operated the car it collided with and damaged another vehicle. *State v. Jordan*, 75 N.C. App. 637, 331 S.E.2d 232, cert. denied, 314 N.C. 544, 335 S.E.2d 23 (1985).

Indictment Held Sufficient. — Indictment which alleged the element of possession of marijuana and further alleged that the amount of marijuana possessed exceeded one ounce set out the elements of possession of more than one ounce of marijuana with sufficient clarity to apprise defendant that he was charged with that offense. *State v. Perry*, — N.C. App. —, 352 S.E.2d 259 (1987).

Motion to Dismiss Equivalent to Motion to Quash. — A motion to dismiss under § 15A-954 for failure of the indictment to charge an offense as provided in this section is the functional equivalent of a motion to quash under prior practice. *State v. Brown*, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

Dismissal on Unsworn Representations Held Erroneous. — The court erred in allowing motion to dismiss indictments which on their face sufficiently alleged the offense of embezzlement, where even assuming, arguendo, that the court could consider extraneous evidence in ruling on the motion, only the unsworn representations of defense counsel at the hearing on defendant's motion, to the effect that defendant was a partner in the victimized partnership, were before the court. *State v. Brown*, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

Quoted in *State v. Childers*, 80 N.C. App. 236, 341 S.E.2d 760 (1986).

Stated in *State v. Willis*, 67 N.C. App. 320, 313 S.E.2d 173 (1984).

Cited in *State v. Baker*, 65 N.C. App. 430, 310 S.E.2d 101 (1983); *State v. Rogers*, 68 N.C. App. 358, 315 S.E.2d 492 (1984); *State v. Ollis*, 318 N.C. 370, 348 S.E.2d 777 (1986).

§ 15A-925. Bill of particulars.

CASE NOTES

A defendant may request a bill of particulars to obtain information to supplement the facts contained in the indictment. *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

Function of a bill of particulars, etc. —

In accord with 1st paragraph in original. See *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985).

Granting or Denial of Motion, etc. —

In accord with 2nd paragraph in original. See *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985).

And not subject to review, etc. —

In accord with original. See *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985).

The granting of a motion for a bill of particulars lies within the discre-

tion of the trial court and is not subject to review by the appellate courts except for gross abuse of discretion. *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

The denial of a defendant's motion for a bill of particulars will be held only upon a clear showing that the lack of timely access to the information significantly impaired the defendant's preparation and conduct of his case. *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984).

Applied in *State v. Whitfield*, 310 N.C. 608, 313 S.E.2d 790 (1984); *State v. Rozier*, 69 N.C. App. 38, 316 S.E.2d 893 (1984); *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985).

Cited in *State v. Creason*, 68 N.C. App. 599, 315 S.E.2d 540 (1984).

§ 15A-926. Joinder of offenses and defendants.

CASE NOTES

I. GENERAL CONSIDERATION.

Public Policy Favors Consolidation. — Where two or more defendants are sought to be held accountable for the

same crime or crimes, not only is joinder permissible under the statute, but public policy strongly compels consolidation as the rule rather than the exception. *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848

(1986); *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986).

Public policy strongly favors consolidation, because it expedites the administration of justice, reduces the congestion of trial dockets, conserves judicial time, lessens the burden upon citizens who must sacrifice both time and money to serve upon juries and avoids the necessity of recalling witnesses who would otherwise be called upon to testify only once. This last factor is especially compelling when the trials involve young children testifying about sexual abuse. *State v. Jenkins*, 83 N.C. App. 616, 351 S.E.2d 299 (1986).

Under this section there must be some sort of "transactional, etc." —

In accord with 1st paragraph in main volume. See *State v. Berryman*, 77 N.C. App. 396, 335 S.E.2d 342 (1985).

This section requires a transactional occurrence between offenses sought to be joined for trial. *State v. Smith*, 70 N.C. App. 293, 319 S.E.2d 647 (1984).

Offenses are properly joined under subsection (a) only when there exists a transactional connection among the charges. *State v. Herring*, 74 N.C. App. 269, 328 S.E.2d 23, discretionary review denied as to additional issues, 314 N.C. 671, 335 S.E.2d 324 (1985), *aff'd*, 316 N.C. 188, 340 S.E.2d 105 (1986).

For offenses to be joined, there must be a transactional connection common to all, and the trial court must determine that a defendant would not be prejudiced by hearing more than one charge at the same trial. *State v. Williams*, 74 N.C. App. 695, 329 S.E.2d 705 (1985).

But mere finding of the transactional connection, etc. —

In accord with original. See *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983); *State v. Effler*, 309 N.C. 742, 309 S.E.2d 203 (1983).

Subsection (a) of this section differs from its predecessor, in part by disallowing joinder on the basis that the acts were of the same class of crime or offense when there is not transactional connection among the offenses. *State v. Williams*, 74 N.C. App. 695, 329 S.E.2d 705 (1985).

In considering whether a "transactional connection" exists among offenses, the courts have taken into consideration such factors as the nature of the offenses charged, and the unique circumstances of each case. *State v. Herring*, 74 N.C. App. 269, 328 S.E.2d 23, discretionary review denied as to addi-

tional issues, 314 N.C. 671, 335 S.E.2d 324 (1985), *aff'd*, 316 N.C. 188, 340 S.E.2d 105 (1986).

While factual similarities, and the nature of the offenses charged as being of the same class, was once all that was required for joinder, this is no longer the case. *State v. Herring*, 74 N.C. App. 269, 328 S.E.2d 23, discretionary review denied as to additional issues, 314 N.C. 671, 335 S.E.2d 324 (1985), *aff'd*, 316 N.C. 188, 340 S.E.2d 105 (1986).

Consolidation Is Within Discretion, etc. —

A trial court's ruling on the consolidation or severance of cases is discretionary and will not be disturbed absent a showing of abuse of discretion; a trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985).

The decision whether to try defendants separately or jointly is ordinarily within the sound discretion of the trial judge, and absent an abuse of that discretion, will not be overturned on appeal. *State v. Jenkins*, 83 N.C. 616, 351 S.E.2d 299 (1986).

Ruling on Consolidation, etc. —

In accord with 1st paragraph in original. See *State v. Effler*, 309 N.C. 742, 309 S.E.2d 203 (1983); *State v. Parrish*, 73 N.C. App. 662, 327 S.E.2d 613 (1985); *State v. Neal*, 76 N.C. App. 518, 333 S.E.2d 538 (1985), *cert. denied*, 315 N.C. 394, 338 S.E.2d 884 (1986); *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985); *State v. Berryman*, 77 N.C. App. 396, 335 S.E.2d 342 (1985).

Motions to join for trial offenses which have the necessary transactional connection under this section are addressed to the discretion of the trial court and, absent a showing of abuse of discretion, its ruling will not be disturbed on appeal. *State v. Kornegay*, 313 N.C. 1, 326 S.E.2d 881 (1985).

Although a motion to consolidate charges for trial is addressed to the sound discretion of the trial court, the determination of whether a group of offenses are transactionally related so that they may be joined for trial is a question of law fully reviewable on appeal. *State v. Williams*, 74 N.C. App. 695, 329 S.E.2d 705 (1985).

The granting of a motion to consolidate is reviewable only for abuse of dis-

cretion. *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

A motion to consolidate charges for trial is addressed to the sound discretion of the trial judge and that ruling will not be disturbed on appeal absent an abuse of discretion. If, however, the charges consolidated for trial possess no transactional connection, then the consolidation is improper as a matter of law. *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983).

The question of whether to join the offenses for trial is addressed to the sound discretion of the trial judge and will not be disturbed absent a showing of abuse of discretion. *State v. Hardy*, 67 N.C. App. 122, 312 S.E.2d 699 (1984).

Function of Appellate Review. —

While the court's ruling on a motion for joinder is reviewable only for abuse of the court's discretion, where there is a serious question of prejudice resulting from consolidation for trial of two or more offenses, the appropriate function of appellate review is to determine whether the case meets the statutory requirements. *State v. Herring*, 74 N.C. App. 269, 328 S.E.2d 23, discretionary review denied as to additional issues, 314 N.C. 671, 335 S.E.2d 324 (1985), *aff'd*, 316 N.C. 188, 340 S.E.2d 105 (1986).

Applied in *State v. Bellamy*, 64 N.C. App. 454, 308 S.E.2d 88 (1983); *State v. Godwin*, 67 N.C. App. 731, 314 S.E.2d 265 (1984); *State v. Poindexter*, 68 N.C. App. 295, 314 S.E.2d 594 (1984); *State v. Ford*, 70 N.C. App. 244, 318 S.E.2d 914 (1984); *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984); *State v. Upright*, 72 N.C. App. 94, 323 S.E.2d 479 (1984); *State v. Albert*, 312 N.C. 567, 324 S.E.2d 233 (1985); *State v. Pergerson*, 73 N.C. App. 286, 326 S.E.2d 336 (1985).

Cited in *State v. Toomer*, 311 N.C. 183, 316 S.E.2d 66 (1984); *State v. McGuire*, 78 N.C. App. 285, 337 S.E.2d 620 (1985).

II. JOINDER OF OFFENSES.

A. In General.

Court Should Consider Whether Accused, etc. —

In deciding whether to join offenses, the court must determine whether the accused can receive a fair hearing on more than one charge at the same trial. If joinder will impair the ability to present a defense, the motions should be denied. *State v. Neal*, 76 N.C. App. 518,

333 S.E.2d 538 (1985), *cert. denied*, 315 N.C. 394, 338 S.E.2d 884 (1986).

Cases Should Not Be Joined, etc. —

In accord with 1st paragraph in original. See *State v. Parrish*, 73 N.C. App. 662, 327 S.E.2d 613 (1985).

In determining whether defendant, etc. —

In accord with original. See *State v. Parrish*, 73 N.C. App. 662, 327 S.E.2d 613 (1985).

This section does not require joinder based merely upon the fact that offenses are of the same class or crime or have common characteristics. *State v. Smith*, 70 N.C. App. 293, 319 S.E.2d 647 (1984).

Nature of Offenses, etc. —

In accord with 2nd paragraph in original. See *State v. Effler*, 309 N.C. 742, 309 S.E.2d 203 (1983).

Section does not allow joinder merely if the offenses are of the same class of crime. *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983).

Transactional Connection Necessary for Joinder. — Subsection (a) provides for joinder of two or more offenses when they are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan. It is not enough that a defendant is charged with acts of the same class of crime or offense; there must also be a transactional connection. *State v. Neal*, 76 N.C. App. 518, 333 S.E.2d 538 (1985), *cert. denied*, 315 N.C. 394, 338 S.E.2d 884 (1986).

Joinder Disallowed Where Acts Are of Same Class of Crime, but No Transactional Connection. — This statute, which became effective in 1975, differs from its predecessor in part by disallowing joinder on the basis that the acts were of the same class of crime or offense when there is no transactional connection among the offenses. *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983); *State v. Effler*, 309 N.C. 742, 309 S.E.2d 203 (1983).

Consolidation Improper as Matter of Law Absent Transactional Connection. — If the charges consolidated for trial possess no transactional connection, then the consolidation is improper as a matter of law. *State v. Effler*, 309 N.C. 742, 309 S.E.2d 203 (1983).

B. Illustrative Cases.

Offenses Committed on Separate Dates. — In the absence of a conspiracy

charge that serves as an umbrella, of offenses that are committed on separate dates cannot be joined for trial, even when they are of like character, unless the circumstances of each offense are so distinctly similar that they serve almost as a fingerprint. *State v. Williams*, 74 N.C. App. 695, 329 S.E.2d 705 (1985).

Subsection (a) of this section would not permit joinder of 13 counts of second-degree burglary, 11 counts of felonious larceny, two counts of conspiracy, and one count of attempted safecracking, which took place on a weekend in October 1982, and on a weekend in January 1983, as there was no single conspiracy charge that served as an umbrella covering the October and January offenses. *State v. Williams*, 74 N.C. App. 695, 329 S.E.2d 705 (1985).

Separate Acts of Taking Vehicles. — Similarity of *modus operandi* and similar circumstance in victims, location, time and motive was present, where the offenses involved two vehicles taken from the same location under similar circumstances four days apart. Viewing these facts as of the time of the order of consolidation, the court properly could find them indicative of a single scheme or plan to deprive members of the YMCA of their property while they used the "Y" facilities. *State v. Neal*, 76 N.C. App. 518, 333 S.E.2d 538 (1985), cert. denied, 315 N.C. 394, 338 S.E.2d 884 (1986).

Burglary and Rape. —

In a prosecution for first-degree burglary and second-degree rape, where the crimes were committed on both occasions against the same victim in the same house at approximately the same time of evening, and on both occasions, entry was gained through a window and the victim was forced to engage in repeated acts of intercourse, and the perpetrator was not armed on either occasion, such evidence established the requisite transactional connection to permit consolidation of the offenses. *State v. Berryman*, 77 N.C. App. 396, 335 S.E.2d 342 (1985).

Robbery and the malicious throwing of acid were joinable offenses under subsection (a), which permits joinder of offenses based on the same act or transaction or on a series of acts or transactions connected together, and use of the fact that the acid was thrown after the robbery to aggravate sentence for the malicious throwing of acid was prohibited by § 15A-1340.4(a)(1)(o). *State*

v. Knox, 78 N.C. App. 493, 337 S.E.2d 154 (1985).

III. JOINDER OF DEFENDANTS.

A. In General.

Joinder of Defendants Is within Trial Court's Discretion. — Whether to allow a motion to join defendants for trial as authorized by statute is ordinarily addressed to the sound discretion of the trial judge. *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986).

And Trial Court's Ruling Will Not Be Disturbed Unless Defendant Is Deprived of Fair Trial. — Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial judge's discretionary ruling on the question will not be disturbed. *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986); *State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986); *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986).

Defendants Charged with Same Crimes, etc. —

Charges against multiple defendants may be joined for trial, pursuant to subdivision (b)(2) of this section, when each defendant is charged with accountability for each offense, or when the several offenses were part of a common scheme or plan. *State v. Childers*, 80 N.C. App. 236, 341 S.E.2d 760, discretionary review denied, 317 N.C. 337, 346 S.E.2d 142 (1986).

Absent Showing of Irreparable, etc. —

In accord with original. See *State v. Herring*, 74 N.C. App. 269, 328 S.E.2d 23, discretionary review denied as to additional issues, 314 N.C. 671, 335 S.E.2d 324 (1985), *aff'd*, 316 N.C. 188, 340 S.E.2d 105 (1986).

Common Scheme or Plan. — In light of the fact that the charges against each defendant arose out of a common scheme or plan entered into by the defendants and the evidence against each would be almost identical, the trial judge did not abuse his discretion by joining the defendants' cases for trial. *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985).

Antagonistic defenses do not necessarily, etc. —

Even though the defendants in a joint trial may offer antagonistic or conflicting defenses, that fact alone does not necessarily warrant severance. *State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986).

Mere inconsistencies in defenses do not necessarily amount to such antagonism between defendants joined for trial as to deprive one or the other of a fair trial. Rather, the defenses must be so irreconcilable that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty or so discrepant as to pose an evidentiary contest more between defendants themselves than between the State and the defendants, resulting in a spectacle where the State simply stands by and witnesses a combat in which the defendants attempt to destroy each other. *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986).

For discussion of whether codefendants who are tried jointly should receive joint or separate sentencing trial, see *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983).

B. Illustrative Cases.

Conspiracy. — Where both defendants were convicted of conspiracy to commit the same instance of breaking or entering and larceny, joinder was proper under this section and did not deprive

defendant of a fair trial. *State v. Fie*, 80 N.C. App. 577, 343 S.E.2d 248, discretionary review denied as to additional issues, 317 N.C. 710, 347 S.E.2d 447 (1986).

False Pretenses. — Joinder of four charges against defendant of obtaining property by false pretenses for trial and consolidation of his cases with those of codefendant upheld. *State v. Childers*, 80 N.C. App. 236, 341 S.E.2d 760, discretionary review denied, 317 N.C. 337, 346 S.E.2d 142 (1986).

Sexual Abuse of Children. — Trial judge did not abuse his discretion in joining the cases of defendant husband and wife, involving sexual abuse upon four young children for whom wife had been babysitting, where she was present at all times, including both times that husband committed his offenses, as under these facts the trial judge could have made a reasoned decision that there was a common scheme or plan, namely a scheme on the part of the defendants to gratify their sexual desires on the children whom they took in to babysit, and the defendants' defenses were not antagonistic. *State v. Jenkins*, 83 N.C. App. 616, 351 S.E.2d 299 (1986).

§ 15A-927. Severance of offenses; objection to joinder of defendants for trial.

CASE NOTES

Legislative Intent. — It must be assumed that the legislature in enacting the Speedy Trial Act was aware of the preexisting subdivision (c)(2) of this section. It must also be assumed that the legislature did not intend to do a vain act. Therefore, it is the court's belief that the provision "right to a speedy trial" found in this section, refers to the defendant's constitutional right to a speedy trial, not his statutory right. This interpretation allows a harmonious existence between these statutes, and returns discretion to trial courts. *State v. Marlow*, 310 N.C. 507, 313 S.E.2d 532 (1984).

This section is intended to protect a defendant's Sixth Amendment rights of confrontation and cross-examination which, because of the privilege against self-incrimination, may be lost when a codefendant's statement, inadmissible against but implicating the defendant, is admitted into evidence against the codefendant at a joint trial.

State v. Sidden, 315 N.C. 539, 340 S.E.2d 340 (1986).

Public Policy Favors Consolidation. — Where two or more defendants are sought to be held accountable for the same crime or crimes, not only is joinder permissible under the statute, but public policy strongly compels consolidation as the rule rather than the exception. *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986).

Discretion of Trial Judge. —

The question of whether to join the offenses for trial is addressed to the sound discretion of the trial judge and will not be disturbed absent a showing of abuse of discretion. *State v. Hardy*, 67 N.C. App. 122, 312 S.E.2d 699 (1984).

A trial court's ruling on the consolidation or severance of cases is discretionary and will not be disturbed absent a showing of abuse of discretion; a trial court may be reversed for an abuse of discretion only upon a showing that its

ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985).

Review of Exercise, etc. —

In accord with 3rd paragraph in the main volume. See *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986); *State v. Giles*, 83 N.C. App. 487, 350 S.E.2d 868 (1986).

In accord with 4th paragraph in original. See *State v. Simmons*, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

Subsection (c)(1) codifies substantially the decision in *Bruton v. United States*, etc. —

In accord with main volume. See *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986).

Subsection (c)(1) Held Inapplicable. —

Where statement was part of the *res gestae* and therefore would have been admissible against both defendant and codefendant had they been tried separately, the trial judge correctly denied defendant's motion for appropriate relief under subdivision (c)(1) of this section. *State v. Sidden*, 315 N.C. 539, 340 S.E.2d 340 (1986).

Antagonistic defenses do not necessarily, etc. —

Even though the defendants in a joint trial may offer antagonistic or conflicting defenses, that fact alone does not necessarily warrant severance. *State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986).

Mere inconsistencies in defenses do not necessarily amount to such antagonism between defendants joined for trial as to deprive one or the other of a fair trial. Rather, the defenses must be so irreconcilable that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty or so discrepant as to pose an evidentiary contest more between defendants themselves than between the State and the defendants, resulting in a spectacle

where the State simply stands by and witnesses a combat in which the defendants attempt to destroy each other. *State v. Belton*, 318 N.C. 141, 347 S.E.2d 755 (1986).

Deletions from defendant's statement of references to codefendant did not materially change the nature of defendant's statement, and he was not prejudiced by admission of the "sanitized" statement. *State v. Giles*, 83 N.C. App. 487, 350 S.E.2d 868 (1986).

Test Is Whether Conflict, etc. —

Each case turns on its own facts, and an abuse of discretion may be shown when the defenses of the codefendants are antagonistic, and the conflict in the defendants' respective positions at trial is of such a nature that, considering all of the other evidence in the case, a defendant would be denied a fair trial. *State v. Simmons*, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

Admission of Codefendant's Out-of-Court Statements. —

Where the testimony of the wife of defendant's codefendant concerning her husband's extrajudicial statements inculcating the defendant added nothing of significance to the defendant's own testimony, which constituted overwhelming untainted evidence of his guilt, error by the trial court in overruling defendant's objections to such testimony or in denying his motion to sever was harmless beyond a reasonable doubt. *State v. Welch*, 316 N.C. 578, 342 S.E.2d 789 (1986).

Applied in *State v. Effler*, 309 N.C. 742, 309 S.E.2d 203 (1983); *State v. Cantrell*, 64 N.C. App. 207, 306 S.E.2d 555 (1983); *State v. Gonzalez*, 311 N.C. 80, 316 S.E.2d 229 (1984); *State v. Rozier*, 69 N.C. App. 38, 316 S.E.2d 893 (1984); *State v. Johnson*, 71 N.C. App. 90, 321 S.E.2d 510 (1984); *State v. Albert*, 312 N.C. 567, 324 S.E.2d 233 (1985).

Stated in *State v. Waller*, 77 N.C. App. 184, 334 S.E.2d 796 (1985).

§ 15A-928. Allegation and proof of previous convictions in superior court.

CASE NOTES

I. GENERAL CONSIDERATION.

The purpose of this section is to insure that defendants are informed of the prior convictions they are charged with

and are given a fair opportunity to either admit or deny them before the State's evidence is concluded; because, as the statute makes plain, if the convictions are denied, the State can then

present proof of that element of the offense to the jury, but cannot do so if the prior convictions are admitted. *State v. Ford*, 71 N.C. App. 452, 322 S.E.2d 431 (1984).

Quoted in *State v. Denning*, 316 N.C. 523, 342 S.E.2d 855 (1986).

II. STIPULATION OF PREVIOUS CONVICTIONS.

Defendant may stipulate, etc. —

Nothing in the State or Federal Constitutions nor in the case law prevents the defendant himself from making a judicial admission or stipulating to an undisputed fact, albeit the fact is essential to the State's case. *State v. Ford*, 71 N.C. App. 452, 322 S.E.2d 431 (1984).

ARTICLE 50.

Voluntary Dismissal.

§ 15A-931. Voluntary dismissal of criminal charges by the State.

CASE NOTES

Entry of voluntary dismissal does not violate right to speedy trial. — Under the present system of voluntary dismissals no indictment is left pending. If dismissed charges are later reinstated, defendant at this point would have standing to move for speedy trial relief. *State v. Herald*, 65 N.C. App. 692, 309 S.E.2d 546 (1983), appeal dismissed, 310 N.C. 479, 312 S.E.2d 887 (1984).

Subsequent Prosecution Following Voluntary Dismissal by State. — A voluntary dismissal taken by the State pursuant to this section does not preclude the State from instituting a subsequent prosecution for the same offense if jeopardy has not attached. *State v. Muncy*, 79 N.C. App. 356, 339 S.E.2d 466, cert. denied, 316 N.C. 736, 345 S.E.2d 396 (1986).

The provisions of this section which allow a prosecutor to take a voluntary dismissal "at any time" do not bar the initiation of subsequent charges, if jeopardy has not attached and if an applicable statute of limitations has not run. *State v. Lamb*, — N.C. App. —, 353 S.E.2d 857 (1987).

Reindictment After Dismissal of Indictment "With Leave." — Where

no criminal proceedings took place during the period from Aug. 14, 1984, when indictment against defendant was dismissed under this section "with leave" until new indictment on July 22, 1985, and defendant was not subject to prosecutorial control, the dismissal was proper and terminated all proceedings against the defendant, even though defendant's bail bond was not discharged. Thus, the reindictment and trial of defendant did not violate the Speedy Trial Act. *State v. Lamb*, — N.C. App. —, 353 S.E.2d 857 (1987).

"With Leave" Language in Notices of Dismissal Disapproved. — Although criminal investigations can always continue following a voluntary dismissal under this section, the insertion of "with leave" language in notices of dismissal under this section is disapproved, as no defendant whose indictment has been dismissed under this section should be made to feel that he or she is subject to prosecutorial control. *State v. Lamb*, — N.C. App. —, 353 S.E.2d 857 (1987).

Cited in *State v. Gross*, 66 N.C. App. 364, 311 S.E.2d 41 (1984).

§ 15A-932. Dismissal with leave when defendant fails to appear and cannot be readily found.

(a) The prosecutor may enter a dismissal with leave for nonappearance when a defendant:

- (1) Cannot be readily found to be served with an order for arrest after the grand jury had indicted him; or
- (2) Fails to appear at a criminal proceeding at which his attendance is required, and the prosecutor believes the defendant cannot be readily found.

(1977, c. 777, s. 1; 1985, c. 250.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective October 1, 1985, rewrote subsection (a), which read: "When a defendant fails to appear at

any criminal proceeding at which his attendance is required and the prosecutor believes that the defendant cannot be readily found, the prosecutor may enter a dismissal with leave for nonappearance under this section."

ARTICLE 51.

Arraignment.

§ 15A-941. Arraignment before judge.

CASE NOTES

Purpose of an arraignment, etc. —

Should the defendant fail to plead after the prosecutor has read the charges or otherwise fairly summarized them, the court must record the fact, and defendant must be tried as if he had entered a plea of not guilty. *State v. Riddle*, 66 N.C. App. 60, 310 S.E.2d 396 (1984), cert. granted and appeal dismissed, 310 N.C. 629, 315 S.E.2d 695, aff'd, 311 N.C. 734, 319 S.E.2d 250 (1984).

Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding. *State v. Riddle*, 66 N.C. App. 60, 310 S.E.2d 396 (1984), cert. granted and appeal dismissed, 310 N.C. 629, 315 S.E.2d 695, aff'd, 311 N.C. 734, 319 S.E.2d 250 (1984).

Where defendant in no way was prejudiced by the lack of formal arraignment he cannot claim reversible error. *State v. Riddle*, 66 N.C. App. 60, 310 S.E.2d 396 (1984), cert. granted and appeal dis-

missed, 310 N.C. 629, 315 S.E.2d 695, aff'd, 311 N.C. 734, 319 S.E.2d 250 (1984).

Defendant's Duty to Object, etc. —

An objection to the arraignment made just before trial begins some months later does not suffice to preserve defendant's complaint about what might have occurred when the arraignment actually took place. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

If a defendant feels that he has not been properly informed of the charges against him at arraignment, it is his duty to object at that time and to have appropriate entries made in the record to show the basis for the objection. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

Failure to conduct an arraignment on a capital charge does not constitute reversible error per se. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

The trial court did not commit reversible error by trying defendant on a capital charge without first conducting a for-

mal arraignment, where in view of the fact that the record was replete with pre-trial motions, letters, and orders which were prefaced by listing the charges against defendant, and in view of the fact that defendant was tried as if he

had pled "not guilty," defendant was not prejudiced by the lack of a formal arraignment. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

§ 15A-942. Right to counsel.

CASE NOTES

Right to Counsel at Arraignment.

— A criminal defendant is entitled to the assistance of counsel at all critical stages of the criminal trial process, including arraignment. *State v. Pait*, 81 N.C. App. 283, 343 S.E.2d 573 (1986).

Counsel Must Be Given Time to Prepare. — In order to effectuate defendant's right to assistance of counsel, defense counsel must be allowed reasonable time and opportunity for prepara-

tion. *State v. Pait*, 81 N.C. App. 286, 343 S.E.2d 573 (1986).

The constitutional requirement for the assistance of counsel is not satisfied merely by an order of appointment; counsel must be given the opportunity to both advise and assist the defendant, and neither can be done without knowledge of the case. *State v. Pait*, 81 N.C. App. 286, 343 S.E.2d 573 (1986).

§ 15A-943. Arraignment in superior court — Required calendaring.

CASE NOTES

I. GENERAL CONSIDERATION.

Quoted in *State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986).

Cited in *State v. Winstead*, 78 N.C. App. 180, 336 S.E.2d 721 (1985).

III. TRIAL DATE WHERE DEFENDANT PLEADS NOT GUILTY.

And Violation, etc. —

Proceeding with defendant's trial over his objection on the same day as his arraignment on superseding indictment constitutes reversible error and necessitates a new trial. *State v. McCabe*, 80 N.C. App. 556, 342 S.E.2d 580 (1986).

§ 15A-945. Waiver of arraignment.

CASE NOTES

Where there is no doubt that a defendant is fully aware of the charge against him, or is in no way prejudiced by the omission of formal arraignment, it is not reversible error for the trial court to fail to conduct a formal arraignment proceeding. *State v. Riddle*, 66 N.C. App. 60, 310 S.E.2d 396 (1984), cert. granted and appeal dismissed, 310 N.C. 629, 315 S.E.2d 695, aff'd, 311 N.C. 734, 319 S.E.2d 250 (1984).

Where defendant in no way was prejudiced by the lack of formal arraignment he cannot claim reversible error. *State v. Riddle*, 66 N.C. App. 60, 310 S.E.2d 396 (1984), cert. granted and appeal dismissed, 310 N.C. 629, 315 S.E.2d 695, aff'd, 311 N.C. 734, 319 S.E.2d 250 (1984).

ARTICLE 52.

Motions Practice.

§ 15A-951. Motions in general; definition, service, and filing.

CASE NOTES

Ex Parte Continuance Voidable But Not Void. — Because this section requires actual notice by service of process where a motion is written, ex parte order of continuance issued by one superior court judge may have been voidable, but it was nevertheless not void. It was therefore binding on judge presiding at defendant's trial until defendant attacked it in a proper manner; and defendant could not attack it collaterally by moving under the Speedy Trial Act for

dismissal of the charges against him, under a contention that the time excluded by the order should not toll time under the Act because the order was ex parte. *State v. Sams*, 317 N.C. 230, 345 S.E.2d 179 (1986).

Applied in *State v. Marlow*, 310 N.C. 507, 313 S.E.2d 532 (1984); *State v. Ford*, 70 N.C. App. 244, 318 S.E.2d 914 (1984); *State v. Parrish*, 73 N.C. App. 662, 327 S.E.2d 613 (1985).

§ 15A-952. Pretrial motions; time for filing; sanction for failure to file; motion hearing date.

Legal Periodicals. —

For note on enforcing criminal discovery in North Carolina through preclusion of the insanity defense as a sanction for the defendant's failure to give timely

notice, in light of *State v. Nelson*, 76 N.C. App. 371, 333 S.E.2d 499 (1985), modified and aff'd, 316 N.C. 350, 341 S.E.2d 561 (1986), see 21 Wake Forest L. Rev. 191 (1985).

CASE NOTES

I. GENERAL CONSIDERATION.

Failure of the trial judge to set a time certain for the presentation of evidence on defendant's motion for a change of venue did not amount to a refusal to give defendant a meaningful opportunity to be heard or to exercise his discretion where the judge indicated that he was ready to hear evidence on the defendant's motion on the day of trial, considering that the judge also said that he would reconsider the substance of the motion if problems appeared during jury selection, and that the defendant showed no prejudice relating to the panel chosen. *State v. Artis*, 316 N.C. 507, 342 S.E.2d 847 (1986).

Applied in *State v. Rogers*, 68 N.C. App. 358, 315 S.E.2d 492 (1984); *State v. Randolph*, 312 N.C. 198, 321 S.E.2d 864 (1984); *State v. Begley*, 72 N.C. App. 37, 323 S.E.2d 56 (1984); *State v. Pippin*, 72

N.C. App. 387, 324 S.E.2d 900 (1985); *State v. Parrish*, 73 N.C. App. 662, 327 S.E.2d 613 (1985).

Stated in *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986).

Cited in *State v. Brown*, 81 N.C. App. 281, 343 S.E.2d 553 (1986); *State v. Flowers*, 318 N.C. 208, 347 S.E.2d 773 (1986).

IV. MOTIONS FOR JOINDER.

Discretion of Trial Court on Motion for Joinder. — Because a motion for joinder is addressed to the trial court's sound discretion, his ruling will not be disturbed absent a showing of abuse of discretion. *State v. Riggs*, 79 N.C. App. 398, 339 S.E.2d 676 (1986).

It was not error for court to allow State's motion to join all offenses on the day defendant's trial began, where defendant made no showing of abuse of

discretion or of any resulting prejudice.
State v. Riggs, 79 N.C. App. 398, 339
 S.E.2d 676 (1986).

§ 15A-953. Motions practice in district court.

CASE NOTES

Stated in *State v. Cronauer*, 65 N.C.
 App. 449, 310 S.E.2d 78 (1983).

§ 15A-954. Motion to dismiss — Grounds applicable to all criminal pleadings; dismissal of proceedings upon death of defendant.

CASE NOTES

I. GENERAL CONSIDERATION.

In the absence of a showing of actual prejudice, the courts should consider dismissal in cases of serious crimes with extreme caution. *State v. Goldman*, 311 N.C. 338, 317 S.E.2d 361 (1984).

Length of the delay, etc. —

It cannot be said precisely how long a delay is too long, but rather the courts must engage in a balancing test. *State v. Goldman*, 311 N.C. 338, 317 S.E.2d 361 (1984).

Motion to Dismiss Equivalent to Motion to Quash. — A motion to dismiss under this section for failure of the indictment to charge an offense as provided in § 15A-924 is the functional equivalent of a motion to quash under prior practice. *State v. Brown*, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

Dismissal on Unsworn Representations Held Error. — The court erred in allowing motion to dismiss indictments which on their face sufficiently alleged the offense of embezzlement, where even assuming, arguendo, that the court could consider extraneous evidence in ruling on the motion, only the unsworn representations of defense counsel at the hearing on defendant's motion, to the effect that defendant was a partner in the victimized partnership, were before the court. *State v. Brown*, 81 N.C. App. 281, 343 S.E.2d 553 (1986).

Applied in *State v. Monk*, 63 N.C. App. 512, 305 S.E.2d 755 (1983); *State v. Cronauer*, 65 N.C. App. 449, 310 S.E.2d 78 (1983).

Quoted in *State v. Alston*, 81 N.C. App. 459, 344 S.E.2d 339 (1986).

Cited in *State v. Baker*, 65 N.C. App. 430, 310 S.E.2d 101 (1983).

II. SPEEDY TRIAL.

A. In General.

In order to prevail on allegations of a constitutional due process violation of the right to a speedy trial, a defendant must show that the delay actually prejudiced the conduct of his defense and that it was unreasonable, unjustified, and engaged in by the prosecution deliberately and unnecessarily in order to gain tactical advantage over the defendant. *State v. Goldman*, 311 N.C. 338, 317 S.E.2d 361 (1984).

Delay Due to Investigation. —

The legitimate need to protect the existence of an ongoing undercover investigation from exposure has been frequently recognized by the federal courts as a reasonable justification for delay in bringing an indictment. *State v. Goldman*, 311 N.C. 338, 317 S.E.2d 361 (1984).

To prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time. *State v. Goldman*, 311 N.C. 338, 317 S.E.2d 361 (1984).

B. Preindictment Delay.

Proof of Intentional Delay. —

To grant a motion to dismiss for preindictment delay, defendant must show

both intentional delay on the part of the State in order to impair defendant's ability to defend himself and actual and substantial prejudice from the preindictment delay. *State v. Parker*, 66 N.C. App. 293, 311 S.E.2d 321 (1984).

Delay Due to, etc. —

Preindictment delay attributable to an ongoing investigation of the case is reasonable, justified, and for legitimate purposes. *State v. Goldman*, 311 N.C. 338, 317 S.E.2d 361 (1984).

§ 15A-957. Motion for change of venue.

Legal Periodicals. — For note discussing the motion for change of venue in light of *State v. Jerrett*, 309 N.C. 239,

307 S.E.2d 339 (1983), see 7 Campbell L. Rev. 73 (1984).

CASE NOTES

Discretion of Trial Judge. —

In accord with 2nd paragraph in original. See *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983); *State v. Baker*, 312 N.C. 34, 320 S.E.2d 670 (1984).

Burden of Showing Prejudice, etc. —

In accord with 1st paragraph in original. See *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984); *State v. Baker*, 312 N.C. 34, 320 S.E.2d 670 (1984).

Defendant Must Show, etc. —

To acquire a change of venue defendant must prove existence of a prejudice so great that he cannot obtain a fair and impartial trial. *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983).

What Defendant Must Show to Establish That Trial Was Unfair. — A defendant, in meeting his burden of showing that pretrial publicity precluded him from receiving a fair trial, must show that jurors have prior knowledge concerning the case, that he exhausted peremptory challenges and that a juror objectionable to the defendant sat on the jury. *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983).

And That Verdict Likely on Prior Conclusions. —

On a motion for change of venue pursuant to this section the defendant must show that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed. The determination of whether the defendant has met this burden of proof rests in the sound discretion of the trial judge and his ruling will not be overturned on appeal absent a showing of gross abuse of discretion. *State v. Gardner*, 311 N.C.

489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985).

Statements by Jurors, etc. —

Motion for change of venue was properly denied where the transcript of the jury selection process reveals that while numerous jurors had heard about the case through television or newspaper accounts of the killings, only one juror had tentatively formed an opinion about defendant's guilt. This juror was immediately excused by defense counsel with the consent of the prosecutor and each juror selected to hear the case stated unequivocally that he or she would determine defendant's guilt or innocence solely on the basis of evidence introduced at trial. *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985).

When Motion Should Be Granted.

— A motion for a change of venue should be granted when it is established that it is reasonably likely that prospective jurors would base their decision in the case upon pretrial information rather than the evidence presented at trial and would be unable to remove from their minds any preconceived impressions they might have formed. *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983).

Failure to Grant Relief, etc. —

In accord with original. See *State v. Baker*, 312 N.C. 34, 320 S.E.2d 670 (1984).

Legitimate concern of county residents in trying criminal defendants locally is not the test for determining whether venue should be changed. The test is whether, due to pretrial publicity, there is a reasonable likelihood that the defendant will not receive a fair trial.

State v. Jerrett, 309 N.C. 239, 307 S.E.2d 339 (1983).

Where each juror stated without equivocation that she could set aside her prior opinion and try the cases solely on the evidence presented in court, the trial court did not abuse its discretion in denying defendant's challenges for cause of these jurors. State v. Corbett, 309 N.C. 382, 307 S.E.2d 139 (1983).

Factual news accounts regarding the commission of a crime and the pretrial proceedings do not of themselves warrant a change of venue. State v. Gardner, 311 N.C. 489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985).

General factual coverage of a crime is not innately prejudicial. State v. Baker, 312 N.C. 34, 320 S.E.2d 670 (1984).

Failure of the trial judge to set a time certain for the presentation of evidence on defendant's motion for a change of venue did not amount to a refusal to give defendant a meaningful opportunity to be heard or to excuse his discretion where the judge indicated that he was ready to hear evidence on the defendant's motion on the day of trial, considering that the judge also said that he would reconsider the substance of the motion if problems appeared during jury selection and that the defendant showed no prejudice relating to the panel chosen. State v. Artis, 316 N.C. 507, 342 S.E.2d 847 (1986).

Stated in State v. Watson, 310 N.C. 384, 312 S.E.2d 448 (1984).

Cited in State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986); State v. Bolt, 81 N.C. App. 133, 344 S.E.2d 51 (1986).

§ 15A-958. Motion for a special venire from another county.

CASE NOTES

Stated in State v. Watson, 310 N.C. 384, 312 S.E.2d 448 (1984).

§ 15A-959. Notice of defense of insanity; pretrial determination of insanity.

Legal Periodicals. —

For note on enforcing criminal discovery in North Carolina through preclusion of the insanity defense as a sanction for the defendant's failure to give timely

notice, in light of State v. Nelson, 76 N.C. App. 371, 333 S.E.2d 499 (1985), modified and aff'd, 316 N.C. 350, 341 S.E.2d 561 (1986), s33 21 Wake Forest L. Rev. 191 (1985).

CASE NOTES

Record established as a matter of law that good cause existed for allowing late filling of the notice of defense of insanity, when on the date of trial counsel responsible for trial of the case was justifiably unavailable due to a medical emergency involving his daughter, and other counsel, who had been employed by defendant's mother, wife and sister was required to assume responsibility for the defendant's defense. State v. Nelson, 316 N.C. 350, 341 S.E.2d 561 (1986).

Expert Examination of Defendant.

— Where a defendant gives notice of his intent to pursue a defense of insanity, it

is not only reasonable, but necessary, that the prosecution be permitted to obtain an expert examination of him. Otherwise there would be no means by which the State could confirm a well-founded claim of insanity, discover fraudulent mental defenses, or offer expert psychiatric testimony to rebut the defendant's evidence where insanity is genuinely at issue. Thus, the trial court has the authority to order such an examination as a part of its inherent power to oversee the proper administration of justice. State v. Jackson, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

In cases where a criminal defendant

gives notice that he will raise insanity as a defense to the charges against him, the trial court has the inherent power to require the defendant to submit to a mental examination by a state or court-appointed psychiatrist for the purpose of inquiring into his mental status at the

time of the alleged offense. *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

Cited in *State v. Davis*, 77 N.C. App. 68, 334 S.E.2d 509 (1985); *State v. Gambrell*, 318 N.C. 249, 347 S.E.2d 390 (1986).

ARTICLE 53.

Motion to Suppress Evidence.

§ 15A-971. Definitions.

Legal Periodicals. —

For note discussing the exclusionary rule in probation revocation hearings in light of *State v. Lombardo*, 306 N.C. 594, 295 S.E.2d 399 (1982), see 19 Wake Forest L. Rev. 845 (1983).

For comment discussing search and seizure in North Carolina in light of *State v. Peck*, 305 N.C. 734, 291 S.E.2d

637 (1982), see 19 Wake Forest L. Rev. 675 (1983).

For note discussing adoption of the trustworthiness doctrine in the treatment of defendants' confessions and admissions, in light of *State v. Parker*, 315 N.C. 222, 337 S.E.2d 487 (1985), see 64 N.C.L. Rev. 1285 (1986).

CASE NOTES

Exclusive method of challenging evidence, etc. —

In accord with original. See *State v. Harris*, 71 N.C. App. 141, 321 S.E.2d 480 (1984).

This Article sets forth the exclusive method for challenging evidence on the ground that its exclusion is constitutionally required. *State v. Maccia*, 311 N.C. 222, 316 S.E.2d 241 (1984).

Article places the burden, etc. —

The defendant has the burden of showing that he has complied with the

procedural requirements of this Article. *State v. Maccia*, 311 N.C. 222, 316 S.E.2d 241 (1984).

Evidence of Prior Conviction. —

Not only is it preferable policy to require a defendant to object to or move to suppress the admission of evidence of a prior conviction in the sentencing stage of a criminal trial, such a requirement is consistent with the general procedural rules. *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983).

§ 15A-972. Motion to suppress evidence before trial in superior court in general.

CASE NOTES

Fifth Amendment Rights Are Personal. — As with Fourth Amendment rights, Fifth Amendment rights are personal and may not be vicariously asserted. *State v. Lipford*, 81 N.C. App. 464, 344 S.E.2d 307 (1986).

When Defendant "Aggrieved". —

In accord with the main volume. See *State v. Sanders*, 317 N.C. 602, 346 S.E.2d 451 (1986).

Defendant Held Not "Aggrieved". —

One of two defendants, who at the very most had previously lived in the house and was at the time of his arrest a frequent visitor, and who was not present at the house when officers arrested the other defendant and seized his shoes, was not an "aggrieved" party as to the seizure of the shoes under this section. *State v. Sanders*, 317 N.C. 602, 346 S.E.2d 451 (1986).

Affidavit Must Accompany Motion to Suppress. — A motion to suppress

pursuant to this section and § 15A-977, which is not accompanied by an affidavit containing facts supporting it, is not proper in form and may therefore be

summarily dismissed. *State v. Harris*, 71 N.C. App. 141, 321 S.E.2d 480 (1984).

Applied in *State v. Ford*, 71 N.C. App. 805, 323 S.E.2d 358 (1984).

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

Legal Periodicals. —

For survey of 1982 law on Criminal

Procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Burden of Establishing Procedural Compliance. —

The defendant has the burden of showing that he has complied with the procedural requirements of this article. *State v. Holloway*, 311 N.C. 573, 319 S.E.2d 261 (1984).

In accord with original. See *State v. Holloway*, 311 N.C. 573, 319 S.E.2d 261 (1984).

Failure to Comply Constitutes Waiver. — A defendant's failure to comply with the requirements of this article is a waiver of his right to suppression of evidence obtained in violation of statutory or constitutional law. *State v. Holloway*, 311 N.C. 573, 319 S.E.2d 261 (1984).

A defendant who fails to file an affidavit to support the general information and belief alleged in his motion waives his right to seek suppression on constitutional grounds of the evidence seized pursuant to the search warrant. *State v.*

Holloway, 311 N.C. 573, 319 S.E.2d 261 (1984).

Voluntary, Noncustodial Incriminating Statements of Insane Person.

— There is no State basis for the exclusion of the noncustodial, self-initiated inculpatory statements of defendant, even though he was a paranoid schizophrenic. *State v. Adams*, — N.C. App. —, 354 S.E.2d 338 (1987).

Applied in *State v. Copeland*, 64 N.C. App. 612, 307 S.E.2d 574 (1983); *State v. Goforth*, 65 N.C. App. 302, 309 S.E.2d 488 (1983); *State v. Ingram*, 65 N.C. App. 585, 309 S.E.2d 576 (1983); *State v. Arrington*, 311 N.C. 573, 319 S.E.2d 254 (1984); *State v. Norris*, 77 N.C. App. 525, 335 S.E.2d 764 (1985).

Stated in *State v. Martin*, 315 N.C. 667, 340 S.E.2d 326 (1986).

Cited in *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983); *State v. Creason*, 68 N.C. App. 599, 315 S.E.2d 540 (1984); *State v. Mercer*, 317 N.C. 87, 343 S.E.2d 885 (1986).

§ 15A-975. Motion to suppress evidence in superior court prior to trial and during trial.

CASE NOTES

I. GENERAL CONSIDERATION.

Effect of Failure, etc. —

In accord with original. See *State v. Maccia*, 311 N.C. 222, 316 S.E.2d 241 (1984).

When none of the exceptions to making the pretrial motion to suppress applies, failure to make the pretrial motion pursuant to statute constitutes a waiver by defendant of his objections to the admission of the evidence. *State v. Harris*, 71 N.C. App. 141, 321 S.E.2d 480 (1984).

Failure to comply with this section can result in summary denial of the motion. *State v. Hicks*, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

Failure of Trial Judge to Rule Formally. — Ordinarily a party is entitled to a timely ruling on an objection to evidence. However, the failure to rule formally does not generally rise to the level of reversible error unless it is accompanied by other conduct of the trial judge evincing an opinion on the merits. *State v. Hicks*, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

Where, following voir dire hearing on defendant's motion at trial to suppress victim's in-court identification, the court recalled the jury while the witness was on the stand and allowed the State to proceed, the record clearly reflected the court's decision to deny defendant's motion, and the court's subsequent filing of written order out of session did not so prejudice defendant as to require a new

trial. *State v. Hicks*, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

Applied in *State v. Maccia*, 311 N.C. 222, 316 S.E.2d 241 (1984).

Cited in *State v. King*, 64 N.C. App. 574, 307 S.E.2d 805 (1983); *State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986).

§ 15A-977. Motion to suppress evidence in superior court; procedure.

CASE NOTES

I. GENERAL CONSIDERATION.

Rule Structured to Encourage Summary Decisions. — The official commentary to this section states that the rule "is structured to produce in as many cases as possible a summary granting or denial of the motion to suppress." The rule as such was intended to facilitate the work of trial courts, expediting decision of motions to suppress and framing the evidentiary questions in the event of a hearing. *Holloway v. Woodard*, 655 F. Supp. 1245 (W.D.N.C. 1987).

Affidavit Must Accompany Motion to Suppress. — A motion to suppress pursuant to § 15A-972 and this section, which is not accompanied by an affidavit containing facts supporting it, is not proper in form and may therefore be summarily dismissed. *State v. Harris*, 71 N.C. App. 141, 321 S.E.2d 480 (1984).

This section requires that the affidavit be filed with the motion to suppress before trial. Defendant's motion to amend, made during the trial, was not timely. There was no abuse of discretion in the court's denial of the motion. *State v. Harris*, 71 N.C. App. 141, 321 S.E.2d 480 (1984).

Requirement of Attachment of Affidavit to Motion Upheld. — The North Carolina rule, under which a motion to suppress wrongfully seized evidence must be filed with an attached affidavit stating the facts upon which that motion is based, is legitimate on its face. *Holloway v. Woodard*, 655 F. Supp. 1245 (W.D.N.C. 1987).

Evidence concerning the administration of a polygraph test may be admissible in the absence of the jury on a voir dire hearing to determine the ad-

missibility of a confession. *State v. Harris*, 315 N.C. 556, 340 S.E.2d 383 (1986).

Discretion to Summarily Deny Motion. — The decision to deny summarily a motion which fails to set forth adequate legal grounds is vested in the sound discretion of the trial court. The alternative is to hold a hearing on the motion, despite the facial insufficiency of the motion itself. *State v. Harvey*, 78 N.C. App. 235, 336 S.E.2d 857 (1985).

Hearing Held Where Motion Not Summarily Denied. — Once the discretionary decision is made not to deny summarily a motion which fails to set forth adequate legal grounds, a hearing must be held at which the burden will be on the State to demonstrate the admissibility of the challenged evidence. *State v. Harvey*, 78 N.C. App. 235, 336 S.E.2d 857 (1985).

Failure of Trial Judge to Rule Formally. — Ordinarily a party is entitled to a timely ruling on an objection to evidence. However, the failure to rule formally does not generally rise to the level of reversible error unless it is accompanied by other conduct of the trial judge evincing an opinion on the merits. *State v. Hicks*, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

Where, following voir dire hearing on defendant's motion at trial to suppress victim's in-court identification, the court recalled the jury while the witness was on the stand and allowed the State to proceed, the record clearly reflected the court's decision to deny defendant's motion, and the court's subsequent filing of written order out of session did not so prejudice defendant as to require a new trial. *State v. Hicks*, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

Defendant's mere denial of the existence of the State's confidential in-

formant failed to rebut the presumed validity of search warrant. Therefore, the trial judge was correct in summarily denying defendant's motion to suppress the evidence seized pursuant to the warrant and in denying defendant's request for an evidentiary hearing as to the good faith of the officer's affidavit in support of the warrant. *State v. Locklear*, — N.C. App. —, 353 S.E.2d 666 (1987).

Hearing with Informant Not Required. — Motion that court adopt a rule requiring a trial judge, upon a defendant's motion, to conduct an in-camera hearing with the informant when a defendant challenges the good faith of an affiant to a search warrant would be denied. *State v. Locklear*, — N.C. App. —, 353 S.E.2d 666 (1987).

Applied in *State v. Ingram*, 65 N.C. App. 585, 309 S.E.2d 576 (1983); *State v. Holloway*, 66 N.C. App. 491, 311 S.E.2d 707 (1984); *State v. Holloway*, 311 N.C. 573, 319 S.E.2d 261 (1984); *State v. Burch*, 70 N.C. App. 444, 320 S.E.2d 28 (1984).

Cited in *State v. Darack*, 66 N.C. App. 608, 312 S.E.2d 202 (1984); *State v. Bruce*, 314 N.C. 273, 337 S.E.2d 510 (1985); *State v. Mercer*, 317 N.C. 87, 343 S.E.2d 885 (1986); *Stevens v. North Carolina*, 638 F. Supp. 1255 (W.D.N.C. 1986); *Cinema I Video, Inc. v. Thornburg*, 83 N.C. App. 544, 351 S.E.2d 305 (1986); *State v. Newcomb*, 84 N.C. App. 92, 351 S.E.2d 565 (1987); *State v. Russell*, — N.C. App. —, 352 S.E.2d 922 (1987).

II. FINDINGS OF FACT.

Judge is the finder of fact, etc. —

Where the trial judge makes his determination on a motion to suppress after a hearing, he must set forth in the record his findings of fact and conclusions of law. Such findings and conclusions are required in order that there may be a meaningful appellate review of the decision. *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984).

When Findings of Fact Not Required. —

As a general rule, after a hearing on a motion to suppress the evidence the trial court must make written findings of fact and conclusions of law. Specific findings of fact are not required, however, where there is no material conflict in the evidence presented at the suppression hearing. *State v. Parks*, 77 N.C. App. 778, 336 S.E.2d 424 (1985), appeal dismissed and cert. denied, 316 N.C. 384, 342 S.E.2d 904 (1986).

Where there is no material conflict in the evidence, findings and conclusions are not necessary, even though the better practice is to find facts. *State v. Edwards*, — N.C. App. —, 354 S.E.2d 344 (1987).

This section does not require that findings be made in writing at the time of the ruling. *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984).

Where defendant did not show prejudice from the failure of the trial court to make findings at the time that the rulings on motion to suppress were made his assignment of error is meritless. *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984).

§ 15A-978. Motion to suppress evidence in superior court or district court; challenge of probable cause supporting search on grounds of truthfulness; when identity of informant must be disclosed.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in *State v. Creason*, 68 N.C. App. 599, 315 S.E.2d 540 (1984); *State v. Elliott*, 69 N.C. App. 89, 316 S.E.2d 632 (1984); *State v. Walker*, 70 N.C. App. 403, 320 S.E.2d 31 (1984); *State v. Creason*, 313 N.C. 122, 326 S.E.2d 24 (1985).

II. IDENTITY OF INFORMANT.

Defendant's mere denial of the existence of the State's confidential informant failed to rebut the presumed validity of the search warrant. Therefore, the trial judge was correct in summarily denying defendant's motion to suppress the evidence seized pursuant to the warrant and in denying defendant's

request for an evidentiary hearing as to the good faith of the officer's affidavit in support of the warrant. *State v. Locklear*, — N.C. App. —, 353 S.E.2d 666 (1987).

Hearing with Informant Not Required. — Motion that court adopt a rule requiring a trial judge, upon a defendant's motion, to conduct an in-camera hearing with the informant when a defendant challenges the good faith of an affiant to a search warrant denied. *State v. Locklear*, — N.C. App. —, 353 S.E.2d 666 (1987).

The privilege of allowing the identity of an informant to remain confidential is not absolute. When an accused can show that disclosure is essential to a fair determination of defendant's rights under the Fourth and Fifth

Amendments, nondisclosure is rendered erroneous. *State v. Craver*, 70 N.C. App. 555, 320 S.E.2d 431 (1984).

Disclosure of Identity Not Required. — Where there was no indication that informant participated in any way in stealing of car or robbery-murder, defendant's motion to compel disclosure of informant's identity was properly denied. *State v. Williams*, 319 N.C. 73, 352 S.E.2d 428 (1987).

Corroboration Held Sufficient. — Where there was independent corroboration of the testimony of the chief witness, defendant was not entitled to know the identity of the informant. *State v. Willis*, 67 N.C. App. 320, 313 S.E.2d 173, cert. denied, 311 N.C. 407, 319 S.E.2d 280 (1984).

§ 15A-979. Motion to suppress evidence in superior and district court; orders of suppression; effects of orders and of failure to make motion.

Legal Periodicals. —

For comment discussing search and seizure in North Carolina in light of

State v. Peck, 305 N.C. 734, 291 S.E.2d 637 (1982), see 19 Wake Forest L. Rev. 675 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in *State v. Hart*, 64 N.C. App. 699, 308 S.E.2d 474 (1983); *State v. Perkerol*, 77 N.C. App. 292, 335 S.E.2d 60 (1985).

Cited in *State v. Jackson*, 308 N.C. 549, 304 S.E.2d 134 (1983); *State v. Holloway*, 66 N.C. App. 491, 311 S.E.2d 707 (1984); *State v. Darack*, 66 N.C. App. 608, 312 S.E.2d 202 (1984); *State v. Ford*, 71 N.C. App. 748, 323 S.E.2d 358 (1984); *State v. Smith*, 317 N.C. 100, 343 S.E.2d 518 (1986); *State v. Thomas*, 81

N.C. App. 200, 343 S.E.2d 588 (1986); *State v. Tarantino*, 83 N.C. App. 473, 350 S.E.2d 864 (1986); *State v. White*, 84 N.C. App. 111, 351 S.E.2d 828 (1987); *Holloway v. Woodard*, 655 F. Supp. 1245 (W.D.N.C. 1987).

II. APPEAL FROM DENIAL OF MOTION.

Notice of Intention to Appeal Required. —

In accord with 1st paragraph in original. See *State v. Atwell*, 62 N.C. App. 643, 303 S.E.2d 402 (1983).

§ 15A-980. Right to suppress use of certain prior convictions obtained in violation of right to counsel.

CASE NOTES

Silence at Trial Precludes Raising Issue on Appeal. — Where a defendant stands silent and, without objection or

motion, allows the introduction of evidence of a prior conviction, he deprives the trial division of the opportunity to

pass on the constitutional question and is properly precluded from raising the issue on appeal. *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983).

Cited in *State v. Thompson*, 64 N.C. App. 354, 307 S.E.2d 397 (1983); *State v.*

Moore, 64 N.C. App. 686, 308 S.E.2d 358 (1983); *State v. Braswell*, 78 N.C. App. 498, 337 S.E.2d 637 (1985); *State v. Haislip*, 79 N.C. App. 656, 339 S.E.2d 832 (1986).

SUBCHAPTER X. GENERAL TRIAL PROCEDURE.

ARTICLE 56.

Incapacity to Proceed.

§ 15A-1001. No proceedings when defendant mentally incapacitated; exception.

CASE NOTES

Burden of Persuasion. —

In accord with original. See *State v. Baker*, 312 N.C. 34, 320 S.E.2d 670 (1984).

Conclusiveness of Findings, etc. —

The court's findings of fact as to defendant's mental capacity are conclusive on appeal if supported by the evidence. *State v. Baker*, 312 N.C. 34, 320 S.E.2d 670 (1984).

Where there was nothing in the record to suggest that defendant suffered from any "mental illness or defect" as specified in subsection (a) of this section, the trial court had no obligation, *ex mero motu*, to conduct any inquiry on

the subject. *State v. Carroll*, 317 N.C. 136, 343 S.E.2d 869 (1986).

Defendant, who had undergone brain surgery to remove a self-inflicted bullet, which surgery necessitated the removal of the entire left frontal lobe of his brain and a small portion of the right frontal lobe, was competent to stand trial and to assist in his defense, notwithstanding a memory impairment resulting from organic brain damage or repression. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

Applied in *State v. Heptinstall*, 309 N.C. 231, 306 S.E.2d 109 (1983); *State v. Smith*, 310 N.C. 108, 310 S.E.2d 320 (1984).

§ 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

(b) When the capacity of the defendant to proceed is questioned, the court:

- (1) May appoint one or more impartial medical experts to examine the defendant and return a written report describing the present state of the defendant's mental health. Reports so prepared are admissible at the hearing and the court may call any expert so appointed to testify at the hearing. In addition, any expert so appointed may be called to testify at the hearing by the court at the request of either party.

- (2) May commit the defendant to a State mental health facility for observation and treatment for the period necessary to determine the defendant's capacity to proceed. In no event may the period exceed 60 days. The director of the facility must direct his report on defendant's condition to the defense attorney and to the clerk of superior court, who must bring it to the attention of the court. The report is admissible at the hearing.
 - a. If the report indicates that the defendant lacks capacity to proceed, proceedings for involuntary civil commitment under Chapter 122C of the General Statutes may be instituted on the basis of the report in either the county where the criminal proceedings are pending or in the county in which the defendant is hospitalized.
 - b. If the report indicates that the defendant has capacity to proceed, the clerk must direct the sheriff to return him to the county.
- (3) Must hold a hearing to determine the defendant's capacity to proceed. If examination is ordered pursuant to subdivision (1) or (2), the hearing must be held after the examination. Reasonable notice must be given to the defendant and to the prosecutor and the State and the defendant may introduce evidence.
 - (d) Any report made to the court pursuant to this section shall be forwarded to the clerk of superior court in a sealed envelope addressed to the attention of a presiding judge, with a covering statement to the clerk of the fact of the examination of the defendant and any conclusion as to whether the defendant has or lacks capacity to proceed. A copy of the full report must be forwarded to defense counsel, or to the defendant if he is not represented by counsel provided, if the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney. Until such report becomes a public record, the full report to the court shall be kept under such conditions as are directed by the court, and its contents shall not be revealed except as directed by the court. Any report made to the court pursuant to this section shall not be a public record unless introduced into evidence. (1973, c. 1286, s. 1; 1975, c. 166, ss. 20, 27; 1977, cc. 25, 860; 1979, 2nd Sess., c. 1313; 1985, c. 588; c. 589, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985, c. 589, s. 64 provides that prosecutions for offenses occurring before the effective date of the act (Jan. 1, 1986) are not abated or affected by the act, and that the statutes that would be applicable but for the act remain applicable to those prosecutions.

Session Laws 1985, c. 589, s. 66 provides that rules to implement the act which are authorized to be adopted by the act or which are otherwise authorized to be adopted by law may be adopted at any time after ratification

(July 4, 1985), but shall not become effective before January 1, 1986.

Session Laws 1985, c. 589, s. 65 is a severability clause.

Effect of Amendments. — Session Laws 1985, c. 588, effective October 1, 1985, substituted "provided, if the question of the defendant's capacity to proceed is raised at any time, a copy of the full report must be forwarded to the district attorney" for "and to the district attorney" at the end of the second sentence of subsection (d).

Session Laws 1985, c. 589, s. 9, effective January 1, 1986, substituted "director" for "superintendent" near the beginning of the third sentence of subdivision

(b)(2) and substituted "Chapter 122C" for "Chapter 122" in paragraph (b)(2)a.

CASE NOTES

I. GENERAL CONSIDERATION.

The trial court has the power on its own motion to make inquiry at any time during trial regarding defendant's capacity to proceed. Indeed, circumstances could exist where the trial court has a constitutional duty to make such an inquiry. *State v. Heptinstall*, 309 N.C. 231, 306 S.E.2d 109 (1983).

Decision to Have Capacity Evaluated in Court's Discretion. — Although this section now requires a hearing, the decision to grant a motion for an evaluation of a defendant's capacity to stand trial remains within the trial judge's discretion. *State v. Gates*, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

Notice. — While this section expressly permits the prosecutor to question a defendant's capacity to proceed and contains no express provision for notice of the motion, the requirement that the question of capacity to proceed may only be raised by a motion, setting forth the reasons for questioning capacity, implies that some notice must be given. *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

Expert Examination of Defendant. — Where a defendant gives notice of his intent to pursue a defense of insanity, it is not only reasonable, but necessary, that the prosecution be permitted to obtain an expert examination of him. Otherwise there would be no means by which the State could confirm a well-founded claim of insanity, discover fraudulent mental defenses, or offer expert psychiatric testimony to rebut the defendant's evidence where insanity is genuinely at issue. Thus, the trial court has the authority to order such an examination as a part of its inherent power to oversee the proper administration of justice. *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

In cases where a criminal defendant gives notice that he will raise insanity as a defense to the charges against him, the trial court has the inherent power to require the defendant to submit to a mental examination by a state or court-appointed psychiatrist for the purpose of inquiring into his mental status at the time of the alleged offense. *State v.*

Jackson, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

Rebuttal by Prosecution's Psychiatrist. — Where a defendant presents expert testimony in support of his claim of insanity, the prosecution's psychiatrist may testify in rebuttal as to statements made by, or information obtained from, the defendant in the course of the examination without violating defendant's rights under the Fifth Amendment to the U.S. Constitution. The trial court must, however, limit the jury's consideration of such statements made during the examination to the issue of insanity and not to the issue of guilt. *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

Judge's Findings of Fact, etc. —

When the trial court, without a jury, determines a defendant's capacity to proceed to trial, it is the court's duty to resolve conflicts in the evidence; the court's findings of fact are conclusive on appeal if there is competent evidence to support them, even if there is also evidence to the contrary. *State v. Heptinstall*, 309 N.C. 231, 306 S.E.2d 109 (1983).

Lack of Findings and Conclusions Not Error Where Evidence Compels Ruling. — Although the better practice is for the trial court to make findings and conclusions when ruling on a motion under subsection (b) of this section, it is not error for the trial court to fail to do so where the evidence would have compelled the ruling made. *State v. Gates*, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

Where defendant had negotiated a plea, his fair trial rights are no longer involved. *State v. Hunt*, 64 N.C. App. 81, 306 S.E.2d 846, cert. denied, 309 N.C. 824, 310 S.E.2d 354 (1983).

Abuse of Discretion Must Be Shown for Reversal. — Where the procedural requirement of a hearing has been met, defendant must show that the trial court abused its discretion in denying the motion before reversal is required. *State v. Gates*, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

Applied in *State v. Monk*, 63 N.C. App. 512, 305 S.E.2d 755 (1983).

Cited in *State v. Martin*, 68 N.C. App. 272, 314 S.E.2d 805 (1984).

II. HEARING.

Hearing Requirement Satisfied by Opportunity to Present Evidence. —

The hearing requirement of subdivision (b)(3) of this section appears to be satisfied along as it appears from the record that the defendant, upon making the motion, is provided an opportunity to present any and all evidence he or she is prepared to present. *State v. Gates*, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

No Particular Hearing Procedure

Mandated. — Although this section requires the court to conduct a hearing when a question is raised as to a defendant's capacity to stand trial, no particular procedure is mandated. The method of inquiry is still largely within the discretion of the trial judge. *State v. Gates*, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

Defendant has the burden of persuasion with respect to establishing his incapacity. *State v. Gates*, 65 N.C. App. 277, 309 S.E.2d 498 (1983).

§ 15A-1003. Referral of incapable defendant for civil commitment proceedings.

(a) When a defendant is found to be incapable of proceeding, the presiding judge, upon such additional hearing, if any, as he determines to be necessary, shall determine whether there are reasonable grounds to believe the defendant meets the criteria for involuntary commitment under Part 7 of Article 5 of Chapter 122C of the General Statutes. If the presiding judge finds reasonable grounds to believe that the defendant meets the criteria, he shall make findings of fact and issue a custody order in the same manner, upon the same grounds and with the same effect as an order issued by a clerk or magistrate pursuant to G.S. 122C-261. Proceedings thereafter are in accordance with Part 7 of Article 5 of Chapter 122C of the General Statutes. If the defendant was charged with a violent crime, including a crime involving assault with a deadly weapon, the judge's custody order shall require a law-enforcement officer to take the defendant directly to a 24-hour facility as described in G.S. 122C-252; and the order must indicate that the defendant was charged with a violent crime and that he was found incapable of proceeding.

(1973, c. 1286, s. 1; 1975, c. 166, s. 20; 1983, c. 380, s. 1; 1985, c. 589, s. 10; 1987, c. 596, s. 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Session Laws 1985, c. 589, s. 64 provides that prosecutions for offenses occurring before the effective date of the act (Jan. 1, 1986) are not abated or affected by the act, and that the statutes that would be applicable but for the act remain applicable to those prosecutions.

Session Laws 1985, c. 589, s. 66 provides that rules to implement the act which are authorized to be adopted by the act or which are otherwise authorized to be adopted by law may be adopted at any time after ratification (July 4, 1985), but shall not become effective before January 1, 1986.

Session Laws 1985, c. 589, s. 65 is a severability clause.

Effect of Amendments. —

The 1985 amendment, effective January 1, 1986, in subsection (a) substituted "Part 7 of Article 5 of Chapter 122C" for "Article 5A of Chapter 122" in the first sentence, substituted "G.S. 122C-261 or G.S. 122C-262" for "G.S. 122-58.3 or G.S. 122-58.18" at the end of the second sentence, substituted "Part 7 of Article 5 of Chapter 122C" for "Article 5A of Chapter 122" in the third sentence, and substituted "a 24-hour facility as described in G.S. 122C-252" for "a community or regional mental health facility pursuant to G.S. 122-58.4(b)" near the middle of the last sentence.

The 1987 amendment, effective October 1, 1987, deleted "or G.S. 122C-262" at the end of the second sentence of subsection (a).

§ 15A-1004. Orders for safeguarding of defendant and return for trial.

(d) If the defendant is placed in the custody of a hospital or institution pursuant to proceedings for involuntary civil commitment, or if the defendant is placed in the custody of another person pursuant to subsection (b), the orders of the trial court must require that the hospital, institution, or individual report the condition of the defendant to the clerk at the same times that reports on the condition of the defendant-respondent are required under Part 7 of Article 5 of Chapter 122C of the General Statutes, or more frequently if the court requires, and immediately if the defendant gains capacity to proceed. The order must also require the report to state the likelihood of the defendant's gaining capacity to proceed, to the extent that the hospital, institution, or individual is capable of making such a judgment.

(1973, c. 1286, s. 1; 1975, c. 166, s. 20; 1983, c. 380, s. 2; c. 460, s. 2; 1985, c. 589, s. 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985, c. 589, s. 64 provides that prosecutions for offenses occurring before the effective date of the act (Jan. 1, 1986) are not abated or affected by the act, and that the statutes that would be applicable but for the act remain applicable to those prosecutions.

Session Laws 1985, c. 589, s. 66 provides that rules to implement the act which are authorized to be adopted by

the act or which are otherwise authorized to be adopted by law may be adopted at any time after ratification (July 4, 1985), but shall not become effective before January 1, 1986.

Session Laws 1985, c. 589, s. 65 is a severability clause.

Effect of Amendments. —

The 1985 amendment, effective January 1, 1986, substituted "Part 7 of Article 5 of Chapter 122C of the General Statutes" for "Chapter 122 of the General Statutes, Article 5A (Involuntary Commitment)" in subsection (d).

ARTICLE 57.

Pleas.

§ 15A-1011. Pleas in district and superior courts; waiver of appearance.

(a) A defendant may plead not guilty, guilty, or no contest "(nolo contendere)." A plea may be received only from the defendant himself in open court except when:

- (1) The defendant is a corporation, in which case the plea may be entered by counsel or a corporate officer; or
- (2) There is a waiver of arraignment and a filing of a written plea of not guilty under G.S. 15A-945; or
- (3) In misdemeanor cases there is a written waiver of appearance submitted with the approval of the presiding judge; or
- (4) Written pleas in traffic cases, hunting and fishing offenses under Chapter 113, and boating offenses under Chapter 75A are authorized under G.S. 7A-146(8); or
- (5) The defendant executes a waiver and plea of not guilty as provided in G.S. 15A-1011(d).

- (6) The defendant, before a magistrate or clerk of court, enters a written appearance, waiver of trial and plea of guilty and at the same time makes restitution in a case wherein the sole allegation is a violation of G.S. 14-107, the check is in an amount provided in G.S. 7A-273(8), and the warrant does not charge a fourth or subsequent violation of this statute.

(1973, c. 1286, s. 1; 1975, c. 166, s. 27; c. 626, s. 1; 1983, c. 586, s. 3; 1987, c. 355, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1987 amendment, effective October 1, 1987, and applicable to pleas en-

tered on or after that date, substituted "the check is in an amount provided in G.S. 7A-273(8)" for "the amount of the check is three hundred dollars (\$300.00) or less" in subdivision (a)(6).

CASE NOTES

Cited in *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985).

ARTICLE 58.

Procedures Relating to Guilty Pleas in Superior Court.

§ 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.

(d) When restitution or reparation by the defendant is a part of the plea arrangement agreement, if the judge concurs in the proposed disposition he may order that restitution or reparation be made as a condition of special probation pursuant to the provisions of G.S. 15A-1351, or probation pursuant to the provisions of G.S. 15A-1343(d). If an active sentence is imposed the court may recommend that the defendant make restitution or reparation out of any earnings gained by the defendant if he is granted work release privileges under the provisions of G.S. 148-33.1, or that restitution or reparation be imposed as a condition of parole in accordance with the provisions of G.S. 148-57.1. The order or recommendation providing for restitution or reparation shall be in accordance with the applicable provisions of G.S. 15A-1343(d).

If the offense is one in which there is evidence of physical, mental or sexual abuse of a minor, the court should encourage the minor and the minor's parents or custodians to participate in rehabilitative treatment and the plea agreement may include a provision that the defendant will be ordered to pay for such treatment.

When restitution or reparation is recommended as part of a plea arrangement that results in an active sentence, the sentencing court shall enter as a part of the commitment that restitution or

reparation is recommended as part of the plea arrangement. The Administrative Office of the Courts shall prepare and distribute forms which provide for ample space to make restitution or reparation recommendations incident to commitments. (1973, c. 1286, s. 1; 1975, c. 117; c. 166, s. 27; 1977, c. 614, ss. 3, 4; 1977, 2nd Sess., c. 1147, s. 1; 1979, c. 760, s. 3; 1985, c. 474, s. 2; 1987, c. 598, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Effect of Amendments. — The 1985 amendment, effective 14 days after ratification, in the first paragraph of subsection (d) substituted "may recommend" for "may order" and "if he is granted" for "if he attains" in the second sentence, inserted "or recommendation" following "The order" in the last sentence, and in the second paragraph of subsection (d) rewrote the first sentence, which formerly read: "When restitution or reparation is ordered as part of a plea arrange-

ment or a condition of parole or work release privileges, the sentencing court shall enter as a part of the commitment that restitution or reparation is ordered as a part of a plea arrangement" and in the second sentence substituted "recommendations" for "orders" near the end thereof. The act was ratified June 26, 1985.

The 1987 amendment, effective October 1, 1987, and applicable to any person sentenced or any juvenile dispositional hearing held on or after that date, inserted the present second paragraph of subsection (d).

CASE NOTES

Failure to inform a client of a plea bargain offer constitutes ineffective assistance of counsel absent extenuating circumstances. *State v. Simmons*, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

Attorney's Misunderstanding of Terms of Plea Bargain Held Prejudicial. — Defendant was prejudiced by the failure of his attorney to inform him of a plea bargain offer, where the attorney had mistakenly interpreted the offer as being conditional upon acceptance of it by his codefendant and therefore did not communicate the offer to defendant when the codefendant did not accept. *State v. Simmons*, 65 N.C. App. 294, 309 S.E.2d 493 (1983).

Guilty Pleas Held Involuntary. —

Guilty pleas made by defendant when, upon his counsel undertaking to plead not guilty for him, the judge became visibly agitated, said in what appeared to be an angry voice that he was tired of "frivolous pleas," and directed counsel to confer with defendant and return with an "honest plea," were involuntary and coerced by the trial judge in violation of defendant's constitutional rights. *State v. Pait*, 81 N.C. App. 286, 343 S.E.2d 573 (1986).

Applied in *State v. Sweigart*, 71 N.C. App. 383, 322 S.E.2d 188 (1984).

Cited in *State v. Simmons*, 64 N.C. App. 727, 308 S.E.2d 95 (1983); *State v. Muncy*, 79 N.C. App. 356, 339 S.E.2d 466 (1986).

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.

CASE NOTES

Defendant Must Be Aware, etc. —

Even though it is error under this statute and constitution for the court to fail to personally inquire of the defendant about his plea and to determine that the plea was voluntary and the in-

formed choice of the defendant, under the total facts and circumstances of a case the error may be harmless beyond a reasonable doubt. Such as where the defendant fails to allege any facts to show that the pleas of guilty were involun-

tary, only that the judge did not ask him personally if they were voluntary. *State v. Williams*, 65 N.C. App. 472, 310 S.E.2d 83 (1983).

Record Must Tend to Show, etc. —

Although the trial court had to determine that there was a "factual basis" that the killing was committed without malice in order to accept the defendant's guilty plea to voluntary manslaughter, there was other evidence before the court, including the fact that the defendant used a deadly weapon to accomplish the killing, to support the finding of the aggravating factor that the killing was committed with malice. *State v. Heidmous*, 75 N.C. App. 488, 331 S.E.2d 200 (1985).

A violation of subsection (b) of this section is error. *State v. Williams*, 65 N.C. App. 472, 310 S.E.2d 83 (1983).

Modification of Involuntary Plea Would Not Make It Acceptable. — Where the trial judge rejected the plea because it was not free and voluntary, an opportunity to modify the agreement would not have resolved the problem and made the plea acceptable. *State v. Martin*, 77 N.C. App. 61, 334 S.E.2d 459

(1985), cert. denied, 317 N.C. 711, 347 S.E.2d 47 (1986).

Factual Basis Shown by Prosecutor's Statement. — Statement of facts given by prosecutor at sentencing hearing held sufficient to support the determination of the sentencing judge that there was a factual basis for the guilty plea. *State v. Shea*, 80 N.C. App. 705, 343 S.E.2d 437, cert. denied, 317 N.C. 713, 347 S.E.2d 452 (1986).

Guilty Pleas Held Involuntary. — Guilty pleas made by defendant when, upon his counsel undertaking to plead not guilty for him, the judge became visibly agitated, said in what appeared to be an angry voice that he was tired of "frivolous pleas," and directed counsel to confer with defendant and return with an "honest plea," were involuntary and coerced by the trial judge in violation of defendant's constitutional rights. *State v. Pait*, 81 N.C. App. 286, 343 S.E.2d 573 (1986).

Applied in *State v. Blandford*, 66 N.C. App. 348, 311 S.E.2d 338 (1984).

Stated in *State v. Muncy*, 79 N.C. App. 356, 339 S.E.2d 466 (1986).

§ 15A-1023. Action by judge in plea arrangements relating to sentence; no approval required when arrangement does not relate to sentence.

CASE NOTES

Modification of Involuntary Plea Would Not Make It Acceptable. — Where the trial judge rejected the plea because it was not free and voluntary, an opportunity to modify the agreement would not have resolved the problem and made the plea acceptable. *State v. Martin*, 77 N.C. App. 61, 334 S.E.2d 459

(1985), cert. denied, 317 N.C. 711, 347 S.E.2d 47 (1986).

Trial court is not required under this section to order continuance on its own motion. *State v. Martin*, 77 N.C. App. 61, 334 S.E.2d 459 (1985), cert. denied, 317 N.C. 711, 347 S.E.2d 47 (1986).

§ 15A-1024. Withdrawal of guilty plea when sentence not in accord with plea arrangement.

CASE NOTES

Reinstatement of a guilty plea following the correction of an error of law does not violate the principles of double jeopardy, and on remand, the

trial court can impose a sentence other than the original plea arrangement, if it follows this section by giving the defendant an opportunity to withdraw his

plea and have the matter continued to the next session of court. State v. Oakley, — N.C. App. —, 352 S.E.2d 447 (1987).

Stated in State v. Oakley, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

§ 15A-1026. Record of proceedings.

CASE NOTES

Applied in State v. Williams, 65 N.C. App. 472, 310 S.E.2d 83 (1983).

Cited in State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985).

ARTICLE 59.

Maintenance of Order in the Courtroom.

§ 15A-1031. Custody and restraint of defendant and witnesses.

CASE NOTES

There is no ban, constitutional or otherwise, against physical restraint in the courtroom per se. What is forbidden by the due process and fair trial guarantees of the Fourteenth Amendment to the United States Constitution and N.C. Const., Art. I, § 19 is physical restraint that improperly deprives a defendant of a fair trial. State v. Wright, 82 N.C. App. 450, 346 S.E.2d 510 (1986).

When Defendant May Be Restrained During Trial. — A defendant

may be physically restrained during his trial when restraint is necessary to maintain order, prevent the defendant's escape, or protect the public. State v. Wright, 82 N.C. App. 450, 346 S.E.2d 510 (1986).

A judge may base his findings supporting the use of restraints upon reliable information which would not be admissible as evidence at a trial. State v. Paige, 316 N.C. 630, 343 S.E.2d 848 (1986).

§ 15A-1033. Removal of disruptive witnesses and spectators.

CASE NOTES

Applied in State v. Higginbottom, 312 N.C. 760, 324 S.E.2d 834 (1985).

ARTICLE 61.

Granting of Immunity to Witnesses.

§ 15A-1051. Immunity; general provisions.

(a) A witness who asserts his privilege against self-incrimination in a hearing or proceeding in court or before a grand jury of North Carolina may be ordered to testify or produce other information as provided in this Article. He may not thereafter be excused from

testifying or producing other information on the ground that his testimony or other information required of him may tend to incriminate him. Except as provided in G.S. 15A-623(h), no testimony or other information so compelled, or any information directly or indirectly derived from the testimony or other information, may be used against the witness in a criminal case, except a prosecution for perjury or contempt arising from a failure to comply with an order of the court. In the event of a prosecution of the witness he shall be entitled to a record of his testimony.

(1973, c. 1286, s. 1; 1985 (Reg. Sess., 1986), c. 843, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 843, s. 6 provides that the act shall become effective October 1, 1986, and shall expire October 1, 1988, but that the expiration date shall

not affect the term or authority of a grand jury constituted at that time.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, rewrote the third sentence of subsection (a), so as to limit the scope of immunity granted to witnesses to use immunity.

CASE NOTES

Applied in *State v. Maynard*, 65 N.C. App. 81, 308 S.E.2d 665 (1983).

Cited in *State v. Vines*, 317 N.C. 242, 345 S.E.2d 169 (1986).

§ 15A-1052. Grant of immunity in court proceedings.

CASE NOTES

Section requires the trial judge, etc. —

Ordinarily it is in the defendant's interest to show that a witness against him is testifying pursuant to an agreement with the state and to disclose the terms of the bargain because such evidence tends to impeach the witness. In some cases the state may wish to make the jury aware of the specific terms of the plea bargain. However, the court is not required to disclose the special terms of a plea bargain to the jury; that decision is left to the parties. When the court, acting on its own motion, removes that decision from the parties, there is the potential for prejudicial reversible

error to occur. *State v. Castleberry*, 73 N.C. App. 420, 326 S.E.2d 312, cert. denied, 314 N.C. 670, 335 S.E.2d 497 (1985).

Jury Should Be Instructed, etc. —

Subsection (c) of this section requires that the trial court inform the jury of the grant of immunity and the order to testify prior to the testimony of the witness under the grant of immunity. *State v. Rutherford*, 70 N.C. App. 674, 320 S.E.2d 916 (1984), cert. denied, 313 N.C. 335, 327 S.E.2d 897 (1985).

Applied in *State v. Bare*, 309 N.C. 122, 305 S.E.2d 513 (1983); *State v. Maynard*, 65 N.C. App. 81, 308 S.E.2d 665 (1983).

§ 15A-1054. Charge reductions or sentence concessions in consideration of truthful testimony.

CASE NOTES

Prosecutor's Obligation Not Dependent on Request. — The obligation on the prosecutor to divulge the information required by subsection (c) of this section does not depend upon a request by the defendant. *State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986).

Testimony Need Not Be Suppressed, etc. — The defendant's rights under subsection (c) of this section were not violated by failure of the State to disclose an anticipated plea bargain between the State and a witness, where not only was there no formal agreement between the State and the witness, but the defendant's counsel was aware sufficiently in advance of trial that the witness was going to testify for the State under a hope of leniency to have brought out in cross-examination the circumstances under which the testimony was being offered. *State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986).

Noncompliance Held Not Prejudi-

cial. — The State failed to comply with subsection (c) of this section by not disclosing the information that a law enforcement official had promised to speak to the district attorney on witness' behalf and see what he could do regarding a reduction in her sentence in exchange for her "truthful" testimony against defendant, but as defendant ultimately was able to attack the witness' credibility through testimony elicited from the agent on cross-examination, and provided counsel for defendant with an extended lunch recess to enable him to prepare his cross-examination of the witness, the court's failure to grant a recess in this instance did not constitute prejudicial error. *State v. Brooks*, 83 N.C. App. 179, 349 S.E.2d 630 (1986).

Applied in *State v. Bare*, 309 N.C. 122, 305 S.E.2d 513 (1983); *State v. Castleberry*, 73 N.C. App. 420, 326 S.E.2d 312 (1985); *State v. Arnold*, 314 N.C. 301, 333 S.E.2d 34 (1985).

ARTICLE 62.

Mistrial.

§ 15A-1061. Mistrial for prejudice to defendant.

CASE NOTES

The purposes of mistrial are to prevent prejudice arising from conduct before the jury and to provide a remedy where the jury is unable to perform its function. Once the court has discharged the jury, there is no purpose in ordering a mistrial: the proceedings may be determined by rulings of the court on matters of law, including new trial motions. *State v. O'Neal*, 67 N.C. App. 65, 312 S.E.2d 493, modified, 311 N.C. 747, 321 S.E.2d 154 (1984).

When Motion Granted. —

In accord with 2nd paragraph in original. See *State v. Leonard*, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985); *State v. Stroud*, 78 N.C. App. 599, 337 S.E.2d 873 (1985).

A defendant's motion for mistrial must be granted, pursuant to this section if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case. The decision as to whether such prejudice has occurred is addressed to the discretion of the trial judge. His decision is not reviewable absent a showing of gross abuse of discretion. *State v. Monk*, 63 N.C. App. 512, 305 S.E.2d 755 (1983).

A mistrial must be declared upon a defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in sub-

stantial and irreparable prejudice to the defendant's case. *State v. Leonard*, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985).

A mistrial is to be declared when conduct takes place inside or outside the courtroom which results in substantial and irreparable prejudice to the defendant. *State v. Brown*, 314 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Not every disruptive event occurring during trial automatically requires the court to declare a mistrial. *State v. Newton*, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

Due process requires that a defendant have a panel of impartial, indifferent jurors. *State v. Rutherford*, 70 N.C. App. 674, 320 S.E.2d 916 (1984), cert. denied, 313 N.C. 335, 327 S.E.2d 897 (1985).

The trial judge must insure that jurors remain impartial and uninfluenced by outside forces. *State v. Rutherford*, 70 N.C. App. 674, 320 S.E.2d 916 (1984), cert. denied, 313 N.C. 335, 327 S.E.2d 897 (1985).

Mistrial Is Matter of Court's Discretion. —

In accord with 1st paragraph in original. See *State v. Rutherford*, 70 N.C. App. 674, 320 S.E.2d 916 (1984), cert. denied, 313 N.C. 335, 327 S.E.2d 897 (1985); *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985).

In accord with 3rd paragraph in main volume. See *State v. Watts*, 77 N.C. App. 124, 334 S.E.2d 400 (1985), cert. denied, 315 N.C. 396, 338 S.E.2d 886 (1986).

In accord with 4th paragraph in main volume. See *State v. Glover*, 77 N.C. App. 418, 335 S.E.2d 86 (1985).

In accord with 5th paragraph in original. See *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

The decision of whether to grant a mistrial rests in the sound discretion of the trial judge, and it will not be disturbed absent a showing of an abuse of discretion. *State v. Brown*, 314 N.C. 232, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

On appeal, the decision of the trial judge is entitled to the greatest respect. He is present while the events unfold and is in a position to know just how far the jury may have been influenced by

the events occurring during the trial and whether it has been possible to erase the prejudicial effect of emotional outburst. Therefore, unless his ruling is so clearly erroneous so as to amount to a manifest abuse of discretion, it will not be disturbed on appeal. *State v. Newton*, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

Emotional Outburst by Prosecuting Witness. — In light of a trial court's prompt actions in directing the removal of the prosecuting witness after her emotional outburst and in resuming his instructions to the jury and the otherwise compelling case against the defendant, the witness's emotional outburst was not so prejudicial to the defendant as to result in reversible error where the trial judge refused to grant a mistrial. *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985).

Mistrial in Capital Cases. — Under the common law of this State, a trial court in a capital case has no authority to discharge the jury without the defendant's consent and hold the defendant for a second trial, absent a showing of "manifest necessity" for a mistrial. *State v. Lachat*, 317 N.C. 73, 343 S.E.2d 872 (1986).

The retroactive declaration of a mistrial upon reconsideration has no valid basis in policy or law. This practice, if allowed, would impermissibly place a defendant who made any mistrial motion at any time in peril, subject to the unlimited discretion of the trial court, of losing his constitutional right to not be twice put in jeopardy for the same offense. *State v. O'Neal*, 67 N.C. App. 65, 312 S.E.2d 493, modified, 311 N.C. 747, 321 S.E.2d 154 (1984).

Scope of Review. — Basically, the determination whether the evidence causes substantial or irreparable prejudice to the defendant's case is within the discretion of the trial judge. The scope of review therefore is limited to whether in denying the motion for a mistrial there has been an abuse of judicial discretion. *State v. Brown*, 64 N.C. App. 637, 308 S.E.2d 346 (1983), aff'd, 310 N.C. 563, 313 S.E.2d 585 (1985).

A ruling on a motion for a mistrial is not reviewable absent a showing of gross abuse of discretion. *State v. Seagroves*, 78 N.C. App. 69, 336 S.E.2d 684 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 905 (1986).

The ruling on a motion for mistrial

will be disturbed on appeal only if so clearly erroneous as to amount to a manifest abuse of discretion. *State v. Stroud*, 78 N.C. App. 599, 337 S.E.2d 873 (1985).

Conduct of sheriff, as jury custodian, on the first day of jury selection, in initially taking a seat adjacent to the prosecutor, did not constitute substantial and irreparable prejudice to defendant where, following objection, the trial judge took immediate steps to correct the situation, and where the sheriff engaged in no communications with the jury during the short interval between the time he sat down and the lodging of

the objection, and there was no allegation that the sheriff made improper extrajudicial comments to any of the jurors. *State v. Brown*, 314 N.C. 232, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Quoted in *State v. Alston*, 81 N.C. App. 459, 344 S.E.2d 339 (1986).

Stated in *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986).

Cited in *State v. King*, 67 N.C. App. 524, 313 S.E.2d 281 (1984); *State v. Hurst*, 82 N.C. App. 1, 346 S.E.2d 8 (1986).

§ 15A-1062. Mistrial for prejudice to the State.

CASE NOTES

Mistrial in Capital Cases. — Under the common law of this State, a trial court in a capital case has no authority to discharge the jury without the defendant's consent and hold the defendant for a second trial, absent a showing of

"manifest necessity" for a mistrial. *State v. Lachat*, 317 N.C. 73, 343 S.E.2d 872 (1986).

Applied in *State v. O'Neal*, 67 N.C. App. 65, 312 S.E.2d 493 (1984).

§ 15A-1063. Mistrial for impossibility of proceeding.

CASE NOTES

Mistrial in Capital Cases. — Under the common law of this State, a trial court in a capital case has no authority to discharge the jury without the defendant's consent and hold the defendant for a second trial, absent a showing of "manifest necessity" for a mistrial. *State v. Lachat*, 317 N.C. 73, 343 S.E.2d 872 (1986).

Defendant's failure to object to termination of her first trial for first degree murder by Court's declaration of a mistrial would not prevent her from receiving the relief to which she was otherwise entitled on grounds of former jeopardy, on appeal of her conviction at a second trial. *State v. Lachat*, 317 N.C. 73, 343 S.E.2d 872 (1986).

The court may declare a mistrial when one of defendant's attorneys testifies for the State. *State v. Malone*, 65 N.C. App. 782, 310 S.E.2d 385, cert. denied and appeal dismissed, 311 N.C. 405, 319 S.E.2d 277 (1984).

Section 15A-1235(d) allows declaration of a mistrial on the same

grounds as this section. *State v. O'Neal*, 67 N.C. App. 65, 312 S.E.2d 493, modified, 311 N.C. 747, 321 S.E.2d 154 (1984).

Discretion of Trial Judge. —

An order of a mistrial on a motion of the court is addressed to the sound discretion of the trial judge, and his ruling on the motion will not be disturbed on appeal absent a gross abuse of that discretion. *State v. Lyons*, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

Mistrial Where Trial Not Fair and Impartial. — Subdivision (1) of this section allows a judge, over the defendant's objection, to grant a mistrial where he could reasonably conclude that the trial will not be fair and impartial. *State v. Lyons*, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

Dismissal of Murder Conviction. — Where the initial declaration of a mistrial during defendant's first trial on the capital charge against her was not the result of manifest necessity, and therefore was error, and it could not be deter-

mined from the record whether the error in initially declaring a mistrial caused the jury to fail to reach agreement after the court had reinstated the jury, and thus deprived defendant of a verdict, the trial court erred when it later denied defendant's motion to dismiss the charge of first degree murder against her for the reason that she had formerly been placed in jeopardy for the same offense.

State v. Lachat, 317 N.C. 73, 343 S.E.2d 872 (1986).

Plea of former jeopardy will not preclude subsequent trial of a defendant, where the mistrial was ordered, over defendant's objections, due to physical necessity or the necessity of doing justice. State v. Lyons, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

§ 15A-1064. Mistrial; finding of facts required.

CASE NOTES

The provisions of this section are simple and clear; their uniform application will protect valued rights of defendants and greatly facilitate the process of appellate review. State v. Jones, 67 N.C. App. 377, 313 S.E.2d 808, cert. denied, — N.C. —, 315 S.E.2d 699 (1984).

It is only a secondary purpose of this section to ensure that a full record is made. Its primary purpose is to protect the valued constitutional rights of criminal defendants. It would seriously weaken this protection if trial judges could ex post facto develop explanations for mistrial rulings. Findings must be made before the declaration to ensure full deliberation; the creation of a record subsequently is no substitute, except perhaps in a few isolated cases. State v. Jones, 67 N.C. App. 377, 313 S.E.2d 808, cert. denied, — N.C. —, 315 S.E.2d 699 (1984).

The purpose of this section is to ensure that mistrial is declared only where there exists real necessity for such an order. The right of the accused to completion of the proceedings before the same tribunal is thereby protected from sudden and arbitrary judicial action. State v. Jones, 67 N.C. App. 377, 313 S.E.2d 808, cert. denied, — N.C. —, 315 S.E.2d 699 (1984).

This section clearly requires findings of fact. Had the General Assembly wished to allow the matter to remain entirely in the discretion of the trial courts, it would have done so. Instead, in a departure from earlier law, the Legislature made such findings mandatory for all orders of mistrial. State v. Jones, 67 N.C. App. 377, 313 S.E.2d 808, cert. denied, — N.C. —, 315 S.E.2d 699 (1984).

The purpose of this section is to protect the constitutional rights of defen-

dants and to facilitate the process of appellate review. State v. Lyons, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

The making of findings sufficient to support the judge's decision to grant a mistrial is mandatory, and the failure to make such findings is error. State v. Odom, 316 N.C. 306, 341 S.E.2d 332 (1986); State v. Lachat, 317 N.C. 73, 343 S.E.2d 872 (1986).

But Defendant Must Object to Failure to Make Findings. — Where defendant failed to make any objection at trial to the judge's failure to make findings as required by this section, he failed to preserve any error for appellate review under the requirements of Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure, as the mandatory nature of this section does not relieve defendant of his responsibility to prevent avoidable errors and the resulting unnecessary appellate review by lodging an appropriate objection. State v. Odom, 316 N.C. 306, 341 S.E.2d 332 (1986).

Defendant's failure to object to termination of her first trial for first degree murder by Court's declaration of a mistrial would not prevent her from receiving the relief to which she was otherwise entitled on grounds of former jeopardy, on appeal of her conviction at a second trial. State v. Lachat, 317 N.C. 73, 343 S.E.2d 872 (1986).

Failure to Make Findings. —

Ordinarily, where a mistrial has been granted at defendant's request, there can be no prejudice to defendant in the failure to make such findings. However, when a defendant contends that serious prosecutorial misconduct precipitated his motion for mistrial, findings of fact may be as essential to adequate review of his double jeopardy claim as in a case in which mistrial is ordered over the de-

fendant's objection. *State v. White*, — N.C. App. —, 354 S.E.2d 324 (1987).

Failure to Make Findings Constituting Harmless Error. — Where, from the record the grounds for mistrial were clear, and were obviously clear to the trial court at the hearing on defendant's motion to dismiss, defendant was not prejudiced by the judge's failure to make the required findings before ordering mistrial and the omission thus constituted harmless error. *State v. White*, — N.C. App. —, 354 S.E.2d 324 (1987).

Dismissal of Murder Conviction. — Where the initial declaration of a mistrial during defendant's first trial on the capital charge against her was not the

result of manifest necessity, and therefore was error, and it could not be determined from the record whether the error in initially declaring a mistrial caused the jury to fail to reach agreement after the court had reinstated the jury, and thus deprived defendant of a verdict, the trial court erred when it later denied defendant's motion to dismiss the charge of first degree murder against her for the reason that she had formerly been placed in jeopardy for the same offense. *State v. Lachat*, 317 N.C. 73, 343 S.E.2d 872 (1986).

Applied in *State v. Coviell*, 69 N.C. App. 622, 317 S.E.2d 917 (1984).

SUBCHAPTER XI. TRIAL PROCEDURE IN DISTRICT COURT.

ARTICLE 66.

Procedure for Hearing and Disposition of Infractions.

§ 15A-1111. General procedure for disposition of infractions.

The procedure for the disposition of an infraction, as defined in G.S. 14-3.1, is as provided in this Article. If a question of procedure is not governed by this Article, the procedures applicable to the conduct of pretrial and trial proceedings for misdemeanors in district court are applicable unless the procedure is clearly inapplicable to the hearing of an infraction. (1985, c. 764, s. 3.)

Editor's Note. — Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall

apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

§ 15A-1112. Venue.

Venue for the conduct of infraction hearings lies in any county where any act or omission constituting part of the alleged infraction occurred. (1985, c. 764, s. 3.)

Editor's Note. — Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall

apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

§ 15A-1113. Prehearing procedure.

(a) Process. — A law enforcement officer may issue a citation for an infraction in accordance with the provisions of G.S. 15A-302. A judicial official may issue a summons for an infraction in accordance with the provisions of G.S. 15A-303.

(b) Detention of Person Charged. — A law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation.

(c) Appearance Bond May Be Required. — A person charged with an infraction may not be required to post an appearance bond if:

- (1) He is licensed to drive by a state that subscribes to the nonresident violator compact as defined in Article 1B of Chapter 20 of the General Statutes, the infraction charged is subject to the provisions of that compact, and he executes a personal recognizance as defined by that compact.
- (2) He is a resident of North Carolina.

Any other person charged with an infraction may be required to post a bond to secure his appearance and a charging officer may require such a person charged to accompany him to a judicial official's office to allow the official to determine if a bond is necessary to secure the person's court appearance, and if so, what kind of bond is to be used. If the judicial official finds that the person is unable to post a secured bond, he must allow the person to be released on execution of an unsecured bond. The provisions of Article 26 of this Chapter relating to issuance and forfeiture of bail bonds are applicable to bonds required pursuant to this subsection.

(d) Territorial Jurisdiction. — A law enforcement officer's territorial jurisdiction to charge a person with an infraction is the same as his jurisdiction to arrest specified in G.S. 15A-402.

(e) Use of Same Process for Two Offenses. — A person may be charged with a criminal offense and an infraction in the same pleading. (1985, c. 764, s. 3; 1985 (Reg. Sess., 1986), c. 852, s. 12.)

Editor's Note. — Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, rewrote subdivision (c)(1), which read: "He is licensed to drive by a state that subscribes to the nonresident violator compact as defined in Article 1B of Chapter 20 of the General Statutes and the infraction charged is subject to the provisions of that compact; or."

§ 15A-1114. Hearing procedure for infractions.

(a) Jurisdiction. — Jurisdiction for the adjudication and disposition of infractions is as specified in G.S. 7A-253 and G.S. 7A-271(d).

(b) No Trial by Jury. — In adjudicatory hearings for infractions, no party has a right to a trial by jury in district court.

(c) Infractions Heard in Civil or Criminal Session. — A district court judge may conduct proceedings relating to traffic infractions in a civil or criminal session of court, unless the infraction is joined with a criminal offense arising out of the same transaction or occur-

rence. In such a case, the criminal offense and the infraction must be heard at a session in which criminal matters may be heard.

(d) Pleas. — A person charged with an infraction may admit or deny responsibility for the infraction. The plea must be made by the person charged in open court, unless he submits a written waiver of appearance which is approved by the presiding judge, or, if authorized by G.S. 7A-146, he waives his right to a hearing and admits responsibility for the infraction in writing and pays the specified penalty and costs.

(e) Duty of District Attorney. — The district attorney is responsible for ensuring that infractions are calendared and prosecuted efficiently.

(f) Burden of Proof. — The State must prove beyond a reasonable doubt that the person charged is responsible for the infraction unless the person admits responsibility.

(g) Recording Not Necessary. — The State does not have to record the proceedings at infraction hearings. With the approval of the court, a party may, at his expense, record any proceeding. (1985, c. 764, s. 3.)

Editor's Note. — Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall

apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense."

§ 15A-1115. Review of disposition by superior court.

(a) Appeal of District Court Decision. — A person who denies responsibility and is found responsible for an infraction in the district court, within 10 days of the hearing, may appeal the decision to the criminal division of the superior court for a hearing de novo. Upon appeal, the defendant is entitled to a jury trial unless he consents to have the hearing conducted by the judge. The State must prove beyond a reasonable doubt that the person charged is responsible for the infraction unless the person admits responsibility. Unless otherwise provided by law, the procedures applicable to misdemeanors disposed of in the superior court apply to those infraction hearings. In the superior court, a prosecutor must represent the State. Appeal from the judgment in the superior court is as provided for other criminal actions in superior court, and the Attorney General must represent the State in an appeal of such actions.

(b) Review of Infractions Originally Disposed of in Superior Court. — If the superior court disposes of an infraction pursuant to its jurisdiction in G.S. 7A-271(d), appeal from that judgment is as provided for criminal actions in the superior court. (1985, c. 764, s. 3; 1985 (Reg. Sess., 1986), c. 852, s. 10.)

Editor's Note. — Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1,

1986] shall be governed by the law in effect at the time of the offense."

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, rewrote the second sentence of subsection (a), which read "Upon appeal, either party, upon demand in the manner required by G.S.

1A-1, Rule 38, is entitled to have the issue of responsibility decided by a jury.”

§ 15A-1116. Enforcement of sanctions.

(a) Use of Contempt or Fine Collection Procedures: Notification of DMV. — If the person does not comply with a sanction ordered by the court, the court may proceed in accordance with Chapter 5A of the General Statutes. If the person fails to pay a penalty or costs, the court may proceed in accordance with Article 84 of this Chapter. If the infraction is a motor vehicle infraction, the court must report a failure to pay the applicable penalty and costs to the Division of Motor Vehicles as specified in G.S. 20-24.2.

(b) No Order for Arrest. — If a person served with a citation for an infraction fails to appear to answer the charge, the court may issue a criminal summons to secure the person's appearance, but an order for arrest may not be used in such cases. (1985, c. 764, s. 3; 1985 (Reg. Sess., 1986), c. 852, ss. 1, 2, 15.)

Editor's Note. — Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: “This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense.”

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, inserted “or costs” in

the second sentence of subsection (a), re-wrote the third sentence of subsection (a), which formerly read “If the infraction is a motor vehicle infraction and the person does not pay the applicable penalty and costs within 30 days of the date specified in the court's judgment, the court must notify the Division of Motor Vehicles of the failure to comply”, and inserted “criminal” preceding “summons to secure the person's appearance” in subsection (b).

§ 15A-1117: Recodified as § 20-24.2 by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 3, effective September 1, 1986.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17 amends Session Laws 1985, c. 764, s. 40, so as to change the effective date of this Article from July 1, 1986 to September 1, 1986.

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: “This

act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense.”

§ 15A-1118. Costs.

Costs assessed for an infraction are as specified in G.S. 7A-304. (1985, c. 764, s. 3.)

Editor's Note. — Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: “This act shall become effective September 1, 1986, and shall

apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be governed by the law in effect at the time of the offense.”

ARTICLES 67 TO 70.

§§ 15A-1119 to 15A-1200: Reserved for future codification purposes.

SUBCHAPTER XII. TRIAL PROCEDURE IN SUPERIOR COURT.

ARTICLE 72.

Selecting and Impaneling the Jury.

§ 15A-1211. Selection procedure generally; role of judge; challenge to the panel; authority of judge to excuse jurors.

CASE NOTES

Subsection (b) requires trial judge to decide all challenges concerning the competency of jurors. Section 15A-1212 merely lists the various grounds for making challenges to jurors. *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983).

The extent of the inquiry of a prospective juror rests within the trial court's discretion and will not be found to be reversible error unless an abuse of discretion is shown. *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

If prospective juror has stated that he has an opinion as to how the case should come out, he may serve if it is established that he can lay aside his im-

pression or opinion and render a verdict based on the evidence presented in court. *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983).

Reopening Examination of Juror.

— The decision of whether to reopen examination of a juror previously accepted by both parties is a matter within the discretion of the trial court. Once the trial court has exercised its discretion to reopen the examination of any juror, the trial court may excuse the juror for cause, and either party may exercise any remaining peremptory challenges to remove the juror. *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986).

Cited in *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986).

§ 15A-1212. Grounds for challenge for cause.

CASE NOTES

I. GENERAL CONSIDERATION.

Section 15A-1211(b) requires the trial judge to decide all challenges concerning the competency of jurors. This section merely lists the various grounds for making challenges to jurors. *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983).

Stated in *Keeten v. Garrison*, 742 F.2d 129 (4th Cir. 1984).

II. MENTAL OR PHYSICAL INFIRMITY.

Hearing Impairment. — Although it is the better practice for trial judges freely to excuse any juror who has a genuine hearing impairment which in the juror's opinion would hamper his or her ability to perform a juror's duties, the trial judge's failure to do so did not amount to an abuse of his discretion where the juror stated he had understood what the lawyers had said during

the voir dire; he had not understood the trial judge at first; he did understand the questions presently being put to him by the judge; and he could raise his hand during the proceeding if anything was said which he did not understand. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

III. OPINION AS TO GUILT OR INNOCENCE.

Subsection (6) is a codification, etc. —

In accord with original. See *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983).

Which interpretation, etc. —

In accord with original. See *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983).

Generally, a juror who has formed an opinion as to defendant's guilt or innocence is not impartial and ought not serve. *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983).

Jurors need not be totally ignorant of the facts and issues involved. *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983).

Defendant must prove existence of an opinion in the juror's mind that will raise a presumption of partiality. *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983).

Juror May Serve if He Can Lay Aside Opinion. — If a prospective juror has stated that he has an opinion as to how the case should come out, he may serve if it is established that he can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983).

To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983).

Where each juror stated without equivocation that she could set aside her prior opinion and try the cases solely on the evidence presented in court, the trial court did not abuse its

discretion in denying defendant's challenges for cause of these jurors. *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983).

IV. INABILITY TO RENDER VERDICT IN ACCORDANCE WITH LAW.

Inability to Impose Death Penalty. —

Where the transcript of the jury voir dire revealed that each juror excused for cause as a result of his or her views on capital punishment clearly indicated that he or she would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed in the present case, the trial court properly excused such jurors for cause. *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

In *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776, reh'g denied, 393 U.S. 898, 89 S. Ct. 67, 21 L. Ed. 2d 186 (1968), the United States Supreme Court authorized exclusion for cause of a juror if it is established that the juror would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case. The North Carolina statute which sets forth the grounds for challenging a juror for cause, adopts the Witherspoon test as the basis for excluding jurors who as a matter of conscience, regardless of the facts and circumstances, would be unable to return a verdict imposing the death penalty. *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985).

Jurors who indicated that they could not vote for the death penalty under any circumstances were properly excused for cause under the requirements of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968) and this section. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

The practice of "death qualifying" juries in capital cases violates neither the United States' Constitution nor N.C. Const., Art. 1, § 19. *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986); *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986).

§ 15A-1213. Informing prospective jurors of case.

CASE NOTES

Cited in *State v. Callahan*, 77 N.C. App. 164, 334 S.E.2d 424 (1985); *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986).

§ 15A-1214. Selection of jurors; procedure.

Legal Periodicals. —

For article, "Peremptories or Peers? — Rethinking Sixth Amendment Doctrine,

Images, and Procedures," see 64 N.C.L. Rev. 501 (1986).

CASE NOTES

I. GENERAL CONSIDERATION.

Reasonable limitations on peremptory challenge procedure may be fixed, so long as the right itself is not taken away. Indeed, although the matter is one of discretion, the general rule is that after a jury is impaneled, the parties have waived their rights to challenge peremptorily a juror. *State v. McLamb*, 313 N.C. 572, 330 S.E.2d 476 (1985).

Defendant's statutory rights were not infringed merely because State and codefendant had removed jurors before she began her voir dire examination. She still had the right to exercise her 14 peremptory challenges and to exert her right to challenge for cause. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986).

A trial court is not required to permit individual voir dire of jurors in a capital case. *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

Right to Challenge. —

The jury selection system permits parties to protect themselves against prejudice by allowing them to exclude unacceptable jurors. *State v. Hedgepeth*, 66 N.C. App. 390, 310 S.E.2d 920 (1984).

Each defendant is entitled to full opportunity to face the prospective jurors, make diligent inquiry into their fitness to serve, and to exercise his right to challenge those who are objectionable to him. *State v. Hedgepeth*, 66 N.C. App. 390, 310 S.E.2d 920 (1984).

Right to Challenge Juror When Examination Is Reopened. — The decision to reopen the examination of a juror previously accepted by the parties is within the sound discretion of the trial court, and once the examination of a juror has been reopened, the parties have

an absolute right to exercise any remaining peremptory challenges to exercise such juror. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986).

Where defendant did not exhaust his peremptory challenges as provided by Subsection (h) of this section, no prejudice was shown in court's refusing to allow him to elicit from a certain juror the opinion expressed to the juror by friends about defendant's guilt or innocence. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

Necessity of Exhausting Peremptory Challenges Under Subsection (h). —

Where defendant exercised only six of the fourteen peremptory challenges permitted him under § 15A-1217(a)(1), because he did not exhaust his peremptory challenges as provided by subsection (h) of this section, no prejudice had been shown as to the juror who remained on the panel. *State v. Quesinberry*, — N.C. —, 354 S.E.2d 446 (1987).

The verb tense in subdivision (i)(2) of this section refers to a time before the renewal motion is made; it does not refer to the time at which the renewal is being made. Had the legislature intended to refer to the time at which the motion is being made, subsection (i)(2) would read: "States in the motion that he would challenge the juror peremptorily were his challenges not then exhausted." Subsection (i)(2) refers back to the time at which the unsuccessful challenge for cause was made. It contemplates a situation where there were no peremptories available at that time. *State v. Johnson*, 317 N.C. 417, 347 S.E.2d 7 (1986).

Subdivisions (i)(1) and (i)(2) Require Exercise of Available Peremp-

tory Challenges. — Subdivisions (i)(1) and (i)(2), read together, require a party who has peremptory challenges available when a challenge for cause is denied to exercise a peremptory challenge to remove the unwanted juror. A party who fails to do so cannot thereafter bring himself within either subdivision (i)(1) or (i)(2). *State v. Johnson*, 317 N.C. 417, 347 S.E.2d 7 (1986).

Mandatory Method for Preserving Rulings for Review. — The statutory method for preserving a defendant's right to seek appellate relief when a trial court refuses to allow a challenge for cause is mandatory and is the only method by which such rulings may be preserved for appellate review. *State v. Sanders*, 317 N.C. 602, 346 S.E.2d 451 (1986).

Preserving Exception to Acceptance of Juror Challenged for Cause. — Where defendant had a peremptory challenge available to him at the time he challenged a juror for cause but did not use it, he did not preserve the ruling on the challenge for cause for appellate review. *State v. Johnson*, 317 N.C. 417, 347 S.E.2d 7 (1986).

Where defendants at no time sought to renew any of their previously denied challenges for cause, they failed to comply with subsections (h) and (i) of this section and were not entitled to any relief on appeal as a result of alleged errors by the trial court in denying their challenges for cause. *State v. Sanders*, 317 N.C. 602, 346 S.E.2d 451 (1986).

Failure to Show Prejudice. — When a defendant has expressed satisfaction at trial with the jurors who actually considered his case and fails to show on appeal that any such juror was unable to be fair and impartial, the defendant has failed entirely to show possible prejudice from the denial of his challenges for cause and is entitled to no relief. *State v. Sanders*, 317 N.C. 602, 346 S.E.2d 451 (1986).

Stated in *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983); *State v. Watson*, 310 N.C. 484, 312 S.E.2d 448 (1984).

Cited in *State v. Wingard*, 317 N.C. 590, 346 S.E.2d 638 (1986).

II. AUTHORITY OF TRIAL JUDGE.

Editor's Note. — *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981), annotated under this analysis line in the

main volume, has been overruled by *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985), to the extent that it gave the trial court discretion to allow or refuse permission to defendant to use one of his peremptory challenges once the trial court has decided to reopen the examination.

Discretion of Trial Court. —

Although it is the better practice for trial judges freely to excuse any juror who has a genuine hearing impairment which in the juror's opinion would hamper his or her ability to perform a juror's duties, the trial judge's failure to do so did not amount to an abuse of his discretion where the juror stated he had understood what the lawyers had said during the voir dire; he had not understood the trial judge at first; he did understand the questions presently being put to him by the judge; and he could raise his hand during the proceeding if anything was said which he did not understand. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

The trial judge, who questioned a juror about her relationship with the state's witness, and received assurances that the juror would have no difficulty in rendering a fair and impartial verdict despite that relationship, was acting well within his discretionary powers when he denied the defendant the opportunity to exercise his remaining peremptory challenge after the jury was impaneled. *State v. McLamb*, 313 N.C. 572, 330 S.E.2d 476 (1985).

After a jury has been impaneled, further challenge of a juror is a matter within the trial judge's discretion. A ruling committed to a trial court's discretion is to be upset only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. *State v. McLamb*, 313 N.C. 572, 330 S.E.2d 476 (1985).

Discretion of Trial Court in Capital Case. — In a capital case, both the State and the defendant are entitled to inquire into a prospective juror's beliefs and attitudes regarding capital punishment, so that both sides may be assured a fair trial before an impartial jury. The trial court, however, is vested with broad discretion in controlling the extent and manner of such inquiry, and its decision will not be disturbed absent a showing of an abuse of discretion. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 109 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Discretion under subsection (j). —

Subsection (j) does not grant either party any absolute right. The decision whether to grant sequestration and individual voir dire of prospective jurors rests in the sound discretion of the trial court and its ruling will not be disturbed absent a showing of abuse of discretion. *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985); *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 109 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Motions for individual voir dire and jury sequestration are directed to the discretion of the trial judge. The exercise of this discretion will not be reversed on appeal absent a showing of abuse. *State v. Reese*, — N.C. —, 353 S.E.2d 352 (1987).

The trial judge did not err in refusing to allow defendant to rehabilitate certain jurors before ruling on the prosecutor's challenge for cause on Witherspoon grounds, where although defendant claimed that these jurors had apparently changed their minds, rendering their positions on the death penalty "ambiguous," and that examination by defendant could have clarified these "ambiguities," defendant made no showing that additional questioning might have produced different answers, and his only attempt at rehabilitation was unsuccessful. *State v. Reese*, — N.C. —, 353 S.E.2d 352 (1987).

Reopening Examination after, etc. —

The intent of the Legislature in adopting subdivision (g) was that the trial court have discretion as to whether to reopen examination of a juror under certain specific conditions, but that the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror once the trial court in its discretion reopened the examination. *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985).

III. QUESTIONING OF PROSPECTIVE JURORS.

Whether to allow sequestration and individual voir dire is a matter for the trial court's discretion, and its ruling will not be reversed absent a showing of abuse of discretion. *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983); *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986).

Collective Voir Dire. — The defendant's arguments that collective voir dire made the prospective jurors aware of prejudicial matters, inhibited the candor of the jurors, and permitted the prospective jurors to become "educated" as to responses which enabled them to be excused from the panel were properly rejected as mere speculation. *State v. Wilson*, 313 N.C. 516, 330 S.E.2d 450 (1985).

View on death penalty as basis for excusal for cause. — Where one juror expressed his belief that every murderer should receive the death sentence; but upon assuring the trial court that he could and would follow the court's instructions and remain open-minded regarding the appropriate sentence, he was seated as a juror, and the other potential juror expressed his uncertainty about whether he could impose the death penalty, even if he were instructed to do so by the court, under the standard in *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985) and *Adams v. Texas*, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980), the first was properly not excused for cause; the second was properly so excused. *State v. Quesinberry*, — N.C. —, 354 S.E.2d 446 (1987).

Likelihood That State Would Carry Out Execution. — Trial court did not err in sustaining the State's objection to defendant's question as to whether a juror did or did not feel that the State would carry out an execution, as defendant failed to show that the inclusion of such a juror would deprive him of a fair and unbiased jury. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 109 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Abuse of Discretion Not Shown. — Where the trial judge clearly intimated that district court facilities and trial schedule would not permit the sequestration and individual voir dire of prospective jurors, and defendant failed to establish that the jury selection process resulted in the "contamination" of other jurors by information from jurors previously exposed to pretrial publicity, defendant failed to show that the trial court abused its discretion by denying the motion for sequestration and individual voir dire of the prospective jurors. *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986).

§ 15A-1216. Impaneling jury.

CASE NOTES

Applied in *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985).

§ 15A-1217. Number of peremptory challenges.

Legal Periodicals. — For article, "Peremptories or Peers? — Rethinking Sixth Amendment Doctrine, Images,

and Procedures," see 64 N.C.L. Rev. 501 (1986).

CASE NOTES

I. GENERAL CONSIDERATION.

Editor's Note. — *State v. Parton*, 303 N.C. 55, 277 S.E.2d 410 (1981) has been overruled by *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985), to the extent that it gave the trial court discretion to allow or refuse permission to defendant to use one of his peremptory challenges once the trial court has decided to reopen the examination.

The right to challenge veniremen peremptorily is equally bestowed on the State and the defendant by this section. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986).

A party's reason, etc. —

A peremptory challenge may be exercised without a stated reason and without being subject to the control of the court. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986).

The use of a peremptory challenge by one party does not unfairly prejudice the opposing party's position in the jury selection process. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986).

Right to Challenge Juror When Examination Is Reopened. — The decision to reopen the examination of a juror previously accepted by the parties is within the sound discretion of the trial court, and once the examination of a juror has been reopened, the parties have an absolute right to exercise any remaining peremptory challenges to excuse such a juror. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986).

Where defendant did not exhaust his peremptory challenges, as provided by § 15A-1214(h), no prejudice was shown in court's refusing to allow defendant to elicit from a certain juror the opinion expressed to the juror by

friends about defendant's guilt or innocence. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

Failure to Show Prejudice. — When defendant has expressed satisfaction at trial with the jurors who actually considered his case and fails to show on appeal that any such juror was unable to be fair and impartial, defendant has failed entirely to show possible prejudice from the denial of his challenges for cause and is entitled to no relief. *State v. Sanders*, 317 N.C. 602, 346 S.E.2d 451 (1986).

Applied in *State v. Jenkins*, 311 N.C. 194, 317 S.E.2d 345 (1984); *State v. Freeman*, 314 N.C. 432, 333 S.E.2d 743 (1985).

II. NUMBER OF CHALLENGES.

Failure to Exhaust Peremptory Challenges. — Where defendant exercised only six of the fourteen peremptory challenges permitted him under subsection (a)(1), because he did not exhaust his peremptory challenges as provided by § 15A-1214(h), no prejudice was shown as to the juror who remained on the panel. *State v. Quesinberry*, — N.C. —, 354 S.E.2d 446 (1987).

III. CAPITAL CASES.

"Capital Case" Defined. —

In accord with the main volume. See *State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986).

When Case Ceases to Be Capital. —

Where the prosecution announced prior to the commencement of jury selection that there was no evidence which would support a reasonable inference of any aggravating factor upon which the jury could recommend a sentence of death should the defendant be convicted

of first-degree murder, the case lost its capital nature, and therefore the defendant was not entitled to 14 peremptory challenges. *State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986).

A case loses its "capital" nature if it is determined that while the death penalty is a possible punishment for the crime

charged, it may not be imposed in that particular case. *State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986).

When case loses its capital nature, defendant is no longer entitled to 14 peremptory challenges. *State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986).

ARTICLE 73.

Criminal Jury Trial in Superior Court.

§ 15A-1221. Order of proceedings in jury trial; reading of indictment prohibited.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in *State v. Elliott*, 69 N.C. App. 89, 316 S.E.2d 632 (1984).

Cited in *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986).

IV. OPENING STATEMENT.

Strict Supervision of Defendant's

Opening Statement. — While the trial judge might have more strictly supervised defendant's opening statement than is done in most trials, the limitations he imposed did not sufficiently prejudice defendant's case to require reversal of his conviction. *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986).

§ 15A-1222. Expression of opinion prohibited.

CASE NOTES

I. GENERAL CONSIDERATION.

Section Not Applicable in Absence of Jury. — This section, which forbids the expression of an opinion by the trial court, is inapplicable when the jury is not present during the questioning. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986).

This section places a duty on the trial judge to be absolutely impartial. *State v. Moorman*, 82 N.C. App. 594, 347 S.E. 857, cert. granted, — N.C. —, 350 S.E.2d 861 (1986).

The judge is not to intimate an opinion in any way, but is to insure a fair and impartial trial before a jury. *State v. Moorman*, 82 N.C. App. 594, 347 S.E.2d 857, cert. granted, — N.C. —, 350 S.E.2d 861 (1986).

Ordinary rulings by the court in the course of the trial do not amount to an impermissible expression of opinion. *State v. Welch*, 65 N.C. App. 390, 308 S.E.2d 910 (1983).

Trial judges must be careful in

what they say and do because a jury looks to the court for guidance and picks up the slightest intimation of an opinion. It does not matter whether the opinion of the trial judge is conveyed to the jury directly or indirectly as every defendant in a criminal case is entitled to a trial before an impartial judge and an unbiased jury. *State v. Sidbury*, 64 N.C. App. 177, 306 S.E.2d 844 (1983).

But not every improper, etc. —

While not every improper remark will require a new trial, a new trial may be awarded if the remarks by the trial judge go to the heart of the case. *State v. Sidbury*, 64 N.C. App. 177, 306 S.E.2d 844 (1983).

A remark by the court is not grounds for a new trial if, when considered in the light of the circumstances under which it was made, it could not have prejudiced defendant's case. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

Determination of Prejudice, etc. —

Expressions which may be erroneous when isolated are not grounds for rever-

sal if, when considered contextually, the charge presents the law fairly and clearly. *State v. Lofton*, 66 N.C. App. 79, 310 S.E.2d 633 (1984).

A defendant has a right to trial before an impartial judge, and any expression or intimation of an opinion by the judge which prejudices the jury against defendant is grounds for a new trial. The expression, however, must be viewed contextually, and whether a defendant was unduly prejudiced by the trial judge's remarks is determined by the probable effect on the jury in light of all the attendant circumstances, the burden being on defendant to show prejudice. *State v. Lofton*, 66 N.C. App. 79, 310 S.E.2d 633 (1984).

Supervision of Defendants' Opening Statement. — While the trial judge might have more strictly supervised defendant's opening statement than is done in most trials, the limitations he imposed did not sufficiently prejudice defendant's case to require reversal of his conviction. *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986).

Inquiry to the jury concerning whether it would prefer to reconvene on Saturday or Monday, which became necessary when the trial judge realized the case could not be completed on Friday, could not be construed as expressing an opinion on any fact involved in the case. *State v. King*, 311 N.C. 603, 320 S.E.2d 1 (1984).

Distribution of Copies of Accomplish's Statements to Individual Jurors. — Fact that the trial judge had copies of accomplice's handwritten statements made for distribution to individual jurors, instead of providing one copy to the 12 jurors and waiting for each one to read the statements and pass them along, was well within his discretion, and the record did not support a finding that defendant was prejudiced by the manner in which the judge chose to pub-

lish these exhibits to the jury. *State v. Harris*, 315 N.C. 556, 340 S.E.2d 383 (1986).

Characterization of case as one of "hurry-and-wait". — Characterization of the case by the trial judge, in explaining to the jury why they were being sent out of the courtroom after a defense objection, as one of "hurry-and-wait," standing alone, was not a sufficient statement of an "opinion" by the trial judge for the Appellate court to conclude that defendants were prejudiced. *State v. Edwards*, — N.C. App. —, 354 S.E.2d 344 (1987).

Applied in *State v. Roberts*, 310 N.C. 428, 312 S.E.2d 477 (1984); *State v. Hobson*, 310 N.C. 555, 313 S.E.2d 546 (1984); *State v. Bean*, 66 N.C. App. 86, 310 S.E.2d 421 (1984); *State v. Welch*, 69 N.C. App. 668, 318 S.E.2d 4 (1984).

Cited in *State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (1983); *State v. Cook*, 65 N.C. App. 703, 309 S.E.2d 737 (1983); *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985); *State v. Slone*, 76 N.C. App. 628, 334 S.E.2d 78 (1985); *Harris-Teeter Supermarkets, Inc. v. Hampton*, 76 N.C. App. 649, 334 S.E.2d 81 (1985); *State v. Froneberger*, 81 N.C. App. 398, 344 S.E.2d 344 (1986); *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986).

II. QUESTIONS BY TRIAL JUDGE.

Questioning by the trial judge, etc. —

In accord with 1st paragraph in the main volume. See *State v. Whittington*, 318 N.C. 114, 347 S.E.2d 403 (1986).

Clarification of Testimony. —

In accord with 1st paragraph in the main volume. See *State v. Whittington*, 318 N.C. 114, 347 S.E.2d 403 (1986).

In accord with 5th paragraph in the main volume. See *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986).

§ 15A-1223. Disqualification of judge.

(b) A judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:

- (1) Prejudiced against the moving party or in favor of the adverse party; or
- (2) Repealed by Session Laws 1983 (Regular Session 1984), c. 1037, s. 6, effective July 1, 1984.
- (3) Closely related to the defendant by blood or marriage; or
- (4) For any other reason unable to perform the duties required of him in an impartial manner.

(e) A judge must disqualify himself from presiding over a criminal trial or proceeding if he is a witness for or against one of the parties in the case. (1977, c. 711, s. 1; 1983 (Reg. Sess., 1984), c. 1037, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective

July 1, 1984, deleted subdivision (b)(2), which read "A witness for or against one of the parties in the case, or" and added subsection (e).

CASE NOTES

Failure of Judge, etc. —

Where there are no facts to cause a reasonable man knowing all the circumstances to doubt the judge's ability to rule on the motion to recuse in an impartial manner, there can be no error in such judge's failure to schedule a hearing on defendant's motion to recuse.

State v. Crabtree, 66 N.C. App. 662, 312 S.E.2d 219 (1984).

Applied in State v. Sweigart, 71 N.C. App. 383, 322 S.E.2d 188 (1984).

Stated in State ex rel. Edmisten v. Tucker, 312 N.C. 326, 323 S.E.2d 294 (1984).

§ 15A-1224. Death or disability of trial judge.

CASE NOTES

Stated in State v. O'Neal, 67 N.C. App. 65, 312 S.E.2d 493 (1984).

§ 15A-1225. Exclusion of witnesses.

CASE NOTES

Discretion of Court. —

In accord with original, see State v. Harrell, 67 N.C. App. 57, 312 S.E.2d 230 (1984); State v. Davis, 68 N.C. App. 238, 314 S.E.2d 828 (1984); State v. Young, 312 N.C. 669, 325 S.E.2d 181 (1985).

A trial judge may order the separation before trial of witnesses who are in the custody of the State. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

The aim of sequestration is twofold: First, it acts as a restraint on witnesses tailoring their testimony to that of earlier witnesses, and second, it aids in detecting testimony that is less than candid. State v. Harrell, 67 N.C. App. 57, 312 S.E.2d 230 (1984).

The separation of witnesses is not founded on the idea of keeping the witnesses from intercourse with each other. That would be a vain attempt. The expectation is not to prevent the fabrication of false stories, but by separate cross-examination to detect them. State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983).

Due process does not automatically require separation of witnesses who are to testify to the same set of facts. State v. Harrell, 67 N.C. App. 57, 312 S.E.2d 230 (1984).

Applied in State v. Stanley, 310 N.C. 353, 312 S.E.2d 482 (1984).

Cited in State v. Byrd, 67 N.C. App. 168, 312 S.E.2d 528 (1984).

§ 15A-1226. Rebuttal evidence; additional evidence.

CASE NOTES

Double jeopardy principles are not applicable to evidence introduced at the rebuttal phase of trial. *State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986).

The judge may permit a party to offer new evidence during rebuttal which could have been offered in the party's case in chief or during a previous rebuttal, but if new evidence is allowed, the other party must be permitted further rebuttal. *State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986).

In the absence of a procedure which prevents the defendant from having an opportunity to challenge or rebut new evidence offered by the State, allowing the State to present new evidence on rebuttal does not violate defendant's right to due process. *State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986).

Reopening of Voir Dire Examination. — Where, after presentation of evidence and arguments of counsel on voir dire on defendant's motion to suppress any statements she made to any investigating officer, but before the court ruled on the motion, the State moved to reopen the evidence for the limited purpose of offering testimony with respect to the nature of the rights furnished by the investigating officer to the defendant under *Miranda*, the court did not

abuse its discretion in reopening the voir dire examination. *State v. Stroud*, 78 N.C. App. 599, 337 S.E.2d 873 (1985).

The trial court has the discretion to allow either party to recall witnesses to offer additional evidence even after jury arguments. *State v. Goldman*, 311 N.C. 338, 317 S.E.2d 361 (1984).

Trial judge did not err in allowing the State to recall victim after the close of defendant's evidence, where the State requested a bench conference less than 15 minutes after learning that the victim wished to testify after having heard defendant's voice as he testified on the stand, and the trial judge allowed defendant's request for a recess, tendered the victim for voir dire examination, and entered into the record extensive findings of fact. *State v. Torian*, 316 N.C. 111, 340 S.E.2d 465 (1986), cert. denied, — U.S. —, 107 S. Ct. 133, 93 L. Ed. 2d 76 (1986).

Applied in *State v. Ziglar*, 308 N.C. 747, 304 S.E.2d 206 (1983); *State v. Bellamy*, 64 N.C. App. 454, 308 S.E.2d 88 (1983); *State v. Smith*, 72 N.C. App. 630, 325 S.E.2d 295 (1985).

Quoted in *State v. Sidden*, 315 N.C. 539, 340 S.E.2d 340 (1986).

Stated in *State v. Davis*, 317 N.C. 315, 345 S.E.2d 176 (1986).

§ 15A-1227. Motion for dismissal.

CASE NOTES

I. GENERAL CONSIDERATION.

Section 15-173 Compared. —

In accord with 1st paragraph in original. See *State v. Lowery*, 309 N.C. 763, 309 S.E.2d 232 (1983).

A defendant's motion to dismiss under subdivision (a)(1) of this section for insufficiency of the evidence to go to the jury is tantamount to a motion for nonsuit under § 15-173. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

Motion for Dismissal Similar to Motion for Nonsuit. —

A motion to dismiss under this section is substantively identical to a motion for

nonsuit under § 15-173. *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986).

Applicability of Cases Dealing with Motion for Nonsuit. —

Cases pertaining to the sufficiency of the evidence under § 15-173 are also applicable to motions made pursuant to this section. *State v. Lowery*, 309 N.C. 763, 309 S.E.2d 232 (1983).

Duty of Trial Court, etc. —

The trial court must decide whether there is substantial evidence of each element of the offense charged. *State v. Jackson*, 74 N.C. App. 92, 327 S.E.2d 270 (1985).

Court Need Not Exclude, etc. —

In accord with main volume. See *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985); *State v. Hope*, 317 N.C. 302, 345 S.E.2d 361 (1986); *State v. Beaver*, 317 N.C. 643, 346 S.E.2d 476 (1986).

When the motion calls into question the sufficiency of circumstantial evidence, the question for the Court is whether a reasonable inference of defendant's guilt may be drawn from the circumstances. If so, it is for the jury to decide whether the facts, taken singly or in combination, satisfy them beyond a reasonable doubt that the defendant is actually guilty. However, inference may not be based on inference. Every inference must stand upon some clear and direct evidence, and not upon some other inference. *State v. Davis*, 74 N.C. App. 208, 328 S.E.2d 11 (1985).

Evidence sufficient to overrule motion to dismiss is also sufficient to overrule motion for directed verdict, since both motions have the same legal effect. *State v. Stinson*, 65 N.C. App. 570, 309 S.E.2d 528 (1983), rev'd in part, 310 N.C. 737, 314 S.E.2d 546 (1984).

Defendant's motion, etc. —

In accord with 2nd paragraph in original. See *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983).

Preference for Submission to Jury in Borderline Cases. — In borderline or close cases, courts have consistently expressed a preference for submitting issues to the jury, both in reliance on the common sense and fairness of the 12 and to avoid unnecessary appeals. *State v. Hamilton*, 77 N.C. App. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1986).

Effect of Dismissal. — A motion to dismiss pursuant to this section tests the sufficiency of the evidence to sustain a conviction and, in that respect, is identical to a motion for judgment as in the case of nonsuit under § 15-173. Therefore, following such dismissal defendant cannot again be placed in jeopardy upon these same charges, and the State has no right of appeal from the judgment entered. *State v. Ausley*, 78 N.C. App. 791, 338 S.E.2d 547 (1986).

Applied in *State v. Keyes*, 64 N.C. App. 529, 307 S.E.2d 820 (1983); *State v. Reber*, 71 N.C. App. 256, 321 S.E.2d 484 (1984); *State v. Durham*, 74 N.C. App. 201, 328 S.E.2d 304 (1985).

Cited in *State v. Kornegay*, 313 N.C. 1, 326 S.E.2d 881 (1985); *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985);

State v. O'Neal, 77 N.C. App. 600, 335 S.E.2d 920 (1985); *State v. Grainger*, 78 N.C. App. 123, 337 S.E.2d 77 (1985); *State v. Mercer*, — N.C. —, 343 S.E.2d 885 (1986); *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986); *State v. Harris*, — N.C. —, 354 S.E.2d 222 (1987).

II. QUESTION PRESENTED.**Question Presented to Court. —**

In accord with 1st paragraph in original. See *State v. Lowery*, 309 N.C. 763, 309 S.E.2d 232 (1983); *State v. Stinson*, 65 N.C. App. 570, 309 S.E.2d 528 (1983), rev'd in part, 310 N.C. 737, 314 S.E.2d 546 (1984); *State v. Greene*, 74 N.C. App. 21, 328 S.E.2d 1 (1985); *State v. Davis*, 74 N.C. App. 208, 328 S.E.2d 11 (1985); *State v. Riddick*, 315 N.C. 749, 340 S.E.2d 55 (1986).

In accord with 4th paragraph in the main volume. See *State v. Hope*, 317 N.C. 302, 345 S.E.2d 361 (1986).

In a motion to dismiss, the question presented is whether the evidence is legally sufficient to support a verdict of guilty on the offense charged, thereby warranting submission of the charge to the jury. *State v. Thomas*, 65 N.C. App. 539, 309 S.E.2d 564 (1983); *State v. Hope*, 317 N.C. 302, 345 S.E.2d 361 (1986); *State v. Beaver*, 317 N.C. 643, 346 S.E.2d 476 (1986).

Upon defendant's motion for dismissal, the question for the trial court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) that defendant was the perpetrator of the offense. If there is such substantial evidence, the motion must be denied. However, if the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the perpetrator, the motion should be allowed. In considering a motion to dismiss, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983); *State v. Malloy*, 309 N.C. 176, 305 S.E.2d 718 (1983).

When a defendant moves under subdivision (a)(2) of this section or under § 15-173 for dismissal at the close of all of the evidence, the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of the defen-

dant's being the perpetrator of the offense. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

The question presented on defendant's motion to dismiss is whether, upon consideration of all the evidence, whether competent or incompetent, in the light most favorable to the State, there is substantial evidence that the crime charged in the bill of indictment was committed and that defendant was a perpetrator of that crime. *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

Sufficiency, Not Weight, etc. —

In accord with 1st paragraph in original. See *State v. Lowery*, 309 N.C. 763, 309 S.E.2d 232 (1983).

Test Same Whether, etc. —

In accord with 1st paragraph in original. See *State v. Lowery*, 309 N.C. 763, 309 S.E.2d 232 (1983).

In accord with 2nd paragraph in original. See *State v. Davis*, 74 N.C. App. 208, 328 S.E.2d 11 (1985).

The test of the sufficiency of the evidence to withstand the motion to dismiss is the same whether the evidence is direct, circumstantial or both. That test is whether a reasonable inference of the defendant's guilt may be drawn from the evidence. If so the evidence is substantial and the defendant's motion to dismiss must be denied. *State v. Malloy*, 309 N.C. 176, 305 S.E.2d 718 (1983).

III. EVIDENCE ON MOTION.

A. In General.

What Evidence Must Show to Survive Motion. — The evidence, considered in the light most favorable to the State and indulging every inference in favor of the State, must be such that a jury could reasonably find the essential elements of the crime charged beyond a reasonable doubt. *State v. Thomas*, 65 N.C. App. 539, 309 S.E.2d 564 (1983).

Substantial Evidence, etc. —

In accord with 3rd paragraph in main volume. See *State v. Capps*, 77 N.C. App. 400, 335 S.E.2d 189 (1985).

In order to withstand a motion to dismiss, the State's evidence as to each element of the offense charged must be substantial. Substantial evidence in this context means more than a scintilla. *State v. Thomas*, 65 N.C. App. 539, 309 S.E.2d 564 (1983).

The test of the sufficiency of the evidence in a criminal case is whether there is substantial evidence of each essential element of the offense charged,

or of a lesser included offense of that charged. *State v. Workman*, 309 N.C. 594, 308 S.E.2d 264 (1983); *State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1983).

To withstand defendant's motion to dismiss, the State is required to show substantial evidence of each of the essential elements of the crime. *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983); *State v. James*, 77 N.C. App. 219, 334 S.E.2d 452 (1985).

Reasonable Inference, etc. —

If the trial court determines that a reasonable inference of defendant's guilt can be drawn from the evidence, then the defendant's motion to dismiss should be denied and the case should be submitted to the jury. *State v. Lowery*, 309 N.C. 763, 309 S.E.2d 232 (1983).

Evidence Must Be More Than, etc. —

In accord with 1st paragraph in original. See *State v. Leonard*, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985).

In accord with 2nd paragraph in original. See *State v. Greene*, 74 N.C. App. 21, 328 S.E.2d 1, modified and aff'd, 314 N.C. 649, 336 S.E.2d 87 (1985); *State v. Davis*, 74 N.C. App. 208, 328 S.E.2d 11 (1985); *State v. Spangler*, 314 N.C. 374, 333 S.E.2d 722 (1985).

Suspicion Insufficient, etc. —

If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator, the motion to dismiss should be allowed. *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983).

It is immaterial whether the evidence is direct, circumstantial, or both. *State v. Bradley*, 65 N.C. App. 359, 309 S.E.2d 510 (1983); *State v. James*, 77 N.C. App. 219, 334 S.E.2d 452 (1985).

Evidence Must Be Considered, etc. —

In accord with 1st paragraph in original. See *State v. Martin*, 309 N.C. 465, 308 S.E.2d 277 (1983); *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1983); *State v. Lowery*, 309 N.C. 763, 309 S.E.2d 232 (1983); *State v. Bradley*, 65 N.C. App. 359, 309 S.E.2d 510 (1983); *State v. Stinson*, 65 N.C. App. 570, 309 S.E.2d 528 (1983), rev'd in part, 310 N.C. 737, 314 S.E.2d 546 (1984); *State v. Capps*, 77 N.C. App. 400, 335 S.E.2d 189 (1985); *State v.*

Hamilton, 77 N.C. App. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1986).

In accord with 2nd paragraph in original. See *State v. Workman*, 309 N.C. 594, 308 S.E.2d 264 (1983).

In accord with 3rd paragraph in original. See *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983); *State v. Jackson*, 74 N.C. App. 92, 327 S.E.2d 270 (1985).

In accord with 4th paragraph in original. See *State v. Parrish*, 73 N.C. App. 662, 327 S.E.2d 613 (1985); *State v. Leonard*, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985).

In making its determination on the sufficiency of the evidence pursuant to a motion to dismiss under this section, the trial court must consider the evidence in the light most favorable to the State. The State is entitled to every reasonable inference to be drawn from the evidence, and any contradictions and discrepancies are to be resolved in favor of the State. All of the evidence actually admitted, whether competent or incompetent, which is favorable to the State must be considered by the trial court in ruling on the motion. *State v. Malloy*, 309 N.C. 176, 305 S.E.2d 718 (1983).

When defendant moves under subdivision (a)(2) of this section or under § 15-173 for dismissal at the close of all the evidence, the trial court is to view all of the evidence in the light most favorable to the state and give the state all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. The trial court must determine as a matter of law whether the state has offered substantial evidence of all elements of the offense charged so any rational trier of fact could find beyond a reasonable doubt that the defendant committed the offense. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

When a defendant moves for dismissal at the close of all the evidence, the trial court is to view all of the evidence in the light most favorable to the state and give it all reasonable inferences that may be drawn from the evidence supporting the charges against the defendant. *State v. Beaver*, 317 N.C. 643, 346 S.E.2d 476 (1986).

Court is to consider all evidence, etc. —

In accord with main volume. See *State v. Spangler*, 314 N.C. 374, 333 S.E.2d 722 (1985).

All Evidence Favorable to State Must Be, etc. —

In accord with 1st paragraph in main volume. See *State v. Capps*, 77 N.C. App. 400, 335 S.E.2d 189 (1985).

All Evidence Introduced Must Be Considered. — Defendant's motion to dismiss must be considered in light of all the evidence introduced by the State, as well as that introduced by defendant. *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

Evidence of Motive and Opportunity. — When the question is whether evidence of both motive and opportunity will be sufficient to survive a motion to dismiss, the answer appears to rest more upon the strength of the evidence of motive and opportunity, as well as other available evidence, rather than an easily quantifiable "bright line" test. *State v. Bell*, 65 N.C. App. 234, 309 S.E.2d 464 (1983), cert. granted, 310 N.C. 630, 313 S.E.2d 592, aff'd, 311 N.C. 299, 316 S.E.2d 72 (1984).

Evidence of either motive or opportunity alone is insufficient to carry a case to the jury. *State v. Bell*, 65 N.C. App. 234, 309 S.E.2d 464 (1983), cert. granted, 310 N.C. 630, 313 S.E.2d 592, aff'd, 311 N.C. 299, 316 S.E.2d 72 (1984).

Sufficiency of Fingerprint Evidence. —

The rule in a case involving fingerprint evidence is that a motion for dismissal or nonsuit is properly denied if, in addition to testimony by a qualified expert that the fingerprints at the scene of the crime match those of the accused, there is substantial evidence of circumstances from which a jury could find that the fingerprints were impressed at the time the crime was committed. *State v. Bradley*, 65 N.C. App. 359, 309 S.E.2d 510 (1983).

Defendant's motion to dismiss is properly denied if there is substantial evidence of each essential element of the offense charged and that defendant committed the offense. *State v. Leonard*, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985).

Contradictions and discrepancies do not warrant dismissal of case. They are for the jury to resolve. *State v. Spangler*, 314 N.C. 374, 333 S.E.2d 722 (1985); *State v. Hamilton*, 77 N.C. App. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33

(1986); *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

B. Substantial Evidence.

"Substantial Evidence" Defined. —

In accord with original. See *State v. Jackson*, 74 N.C. App. 92, 327 S.E.2d 270 (1985); *State v. Leonard*, 74 N.C. App. 443, 328 S.E.2d 593, cert. denied, 314 N.C. 120, 332 S.E.2d 487 (1985).

What is substantial evidence is a question of law for the court; what the evidence proves or not is a question for the jury. *State v. Bradley*, 65 N.C. App. 359, 309 S.E.2d 510 (1983).

C. Defendant's Evidence.

Defendant's evidence, unless favorable, etc. —

If defendant does present evidence, it is disregarded on his motion to dismiss except to the extent that it is favorable to the State. *State v. Hamilton*, 77 N.C. App. 506, 335 S.E.2d 506 (1985), cert. denied, 315 N.C. 593, 341 S.E.2d 33 (1986).

Court must consider defendant's evidence which explains or clarifies that offered by the State. *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983).

Court must consider defendant's evidence which rebuts the inference of guilt when it is not inconsistent with the State's evidence. *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983).

IV. APPEAL FROM RULING ON MOTION.

B. Introduction of Evidence at Trial by Defendant.

Waiver of Motion at Close of State's Evidence. —

By presenting evidence at trial, defendant was held to have waived his right to assert the denial of his motion for dismissal made at the close of the State's evidence as error on appeal. *State v. Powell*, 74 N.C. App. 584, 328 S.E.2d 613 (1985).

Under this section, if defendant introduces evidence following the denial of his motion for nonsuit, he thereby waives any motion for dismissal or judgment as in case of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal. *State v. Bruce*, 315 N.C. 273, 337 S.E.2d 510 (1985).

§ 15A-1228. Notes by the jury.

CASE NOTES

The failure to instruct under this section does not entitle a defendant to a new trial unless he can show some effect

thereof on the jury's deliberations. *State v. Durham*, 74 N.C. App. 121, 327 S.E.2d 312 (1985).

§ 15A-1230. Limitations on argument to the jury.

Legal Periodicals. — For article, "Rummaging Through a Wilderness of Verbiage, The Charge Conference, Jury

Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

CASE NOTES

The right to closing argument is substantial legal right of which a defendant may not be deprived by the exercise of a judge's discretion. *State v. Eury*, 317 N.C. 511, 346 S.E.2d 447 (1986).

When, in a capital case, a defendant does not offer evidence and is entitled to both open and close the argument to the jury, his attorneys may each

address the jury as many times as they desire during the closing phase of the argument. The only limit to this right is the provision of § 84-14 allowing the trial judge to limit to three the number of counsel on each side who may address the jury. *State v. Eury*, 317 N.C. 511, 346 S.E.2d 447 (1986).

In a capital case as many as three counsel on each side may argue for as

long as they wish and each may address the jury as many times as he desires. *State v. Eury*, 317 N.C. 511, 346 S.E.2d 447 (1986).

If in a non-capital case defendant elects to present evidence, he is entitled to open the argument to the jury before the prosecution argues, and two of his counsel may address the jury within the time limits prescribed by § 84-14. *State v. Eury*, 317 N.C. 511, 346 S.E.2d 447 (1986).

If defendant in a non-capital case does not present evidence, he is entitled to both open and close the argument to the jury. In such case he may have one lawyer make the opening argument and one the closing, or he may waive one argument and have both lawyers address the jury during the remaining argument. *State v. Eury*, 317 N.C. 511, 346 S.E.2d 447 (1986).

Where defendant by stipulation waived her opening argument, the failure of the trial judge to allow both of the defendant's counsel to make the closing argument was prejudicial error in the non-capital as well as the capital charges against her. *State v. Eury*, 317 N.C. 511, 346 S.E.2d 447 (1986).

Discretion of Trial Judge. —

Argument of counsel must be left largely to the control and discretion of the trial judge, and counsel must be allowed wide latitude in their arguments which are warranted by the evidence and are not calculated to mislead or prejudice the jury. *State v. Riddle*, 311 N.C. 734, 319 S.E.2d 250 (1984).

When a prosecutor becomes abusive and injects his personal views and opinions into the argument before the jury, he violates the rules of fair debate, and it becomes the duty of the trial

judge to intervene to stop improper argument. *State v. Riddle*, 311 N.C. 734, 319 S.E.2d 250 (1984).

Argument of Prior Misconduct as Substantive Evidence of Guilt Held Cured by Instruction. — While it is proper to refer to evidence of prior acts of misconduct in the arguments on the issue of credibility, it is improper for the prosecutor to argue defendant's prior misdeeds for purposes other than mere impeachment, that is, attempting to use these prior acts as substantive evidence of defendant's guilt. But, where each time defendants objected to the challenged remarks, the objections were sustained and the trial judge carefully instructed the jury that they were to consider the evidence of defendant's past behavior only as he would explain in his charge, and the judge then later gave a complete and accurate instruction relating to the jury's consideration of defendant's prior acts of misconduct, the remarks did not constitute prejudice to defendant such that the trial judge was required to declare a mistrial on his own motion. *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983).

Reconstruction of Trial Record. — Because the defendant failed to cooperate with the trial court to provide the appellate court with a reconstructed record of the state's closing argument, which the trial court failed to record, the appellate court was precluded from reviewing the defendant's argument that the state made improper remarks and referred to matters outside the trial record. *State v. Moore*, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, 315 N.C. 188, 337 S.E.2d 862 (1985).

Applied in *State v. Potter*, 69 N.C. App. 199, 316 S.E.2d 359 (1984).

§ 15A-1231. Jury instructions.

Legal Periodicals. — For article, "Rummaging Through a Wilderness of Verbiage, The Charge Conference, Jury

Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

CASE NOTES

Unrecorded Conference Required Absent Request. — If either party to the trial desires a recorded instruction conference, subsection (b) of this section requires that party to make such a request to the trial judge. Absent such a request, subsection (b) is silent and Rule

21 of the General Rules of Practice for Superior and District Courts supplements the statute by requiring the trial court to hold an unrecorded conference. *State v. Nealy*, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

Requests for special instructions, etc. —

The judge is not required to compose the words of a request for a special instruction. *State v. Webster*, 71 N.C. App. 321, 322 S.E.2d 421 (1984).

Correction of Instruction. — Although the trial judge did not instruct the jury in his original instruction that they could consider the purpose of facilitating flight, that omission was error favorable to the defendant where the indictment and the evidence both supported the instruction, and it was therefore not error for the trial judge to correct his instruction before the jury ren-

dered its verdict on the kidnapping charge, as the State was entitled to the instruction and the instruction did not in any way change any instructions discussed at the charge conference. *State v. Mason*, 317 N.C. 283, 345 S.E.2d 195 (1986).

Applied in *State v. Luker*, 65 N.C. App. 644, 310 S.E.2d 63 (1983); *State v. Aldridge*, 67 N.C. App. 655, 314 S.E.2d 139 (1984); *State v. Moser*, 74 N.C. App. 216, 328 S.E.2d 315 (1985).

Stated in *State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986).

Cited in *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986).

§ 15A-1232. Jury instructions; explanation of law; opinion prohibited.

In instructing the jury, the judge shall not express an opinion as to whether or not a fact has been proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law to the evidence. (1977, c. 711, s. 1; 1985, c. 537, s. 1.)

Effect of Amendments. — The 1985 amendment, effective July 1, 1985, rewrote this section, which formerly read: "In instructing the jury, the judge must declare and explain the law arising on the evidence. He is not required to state the evidence except to the extent necessary to explain the application of the law

to the evidence. He must not express an opinion whether a fact has been proved."

Legal Periodicals. —

For article, "Rummaging Through a Wilderness of Verbiage, The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

CASE NOTES

I. GENERAL CONSIDERATION.

Editor's Note. — Most of the cases below were decided under this section as it read prior to its amendment in 1985.

This section no longer requires trial judges to state, summarize, or recapitulate the evidence or to explain the application of the law. They may, however, elect to do so through the exercise of their discretion. *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986).

The trial court must declare and explain the law arising on the evidence, state the evidence to the extent necessary to explain the application of the law thereto, and refrain from expression of an opinion whether a fact has been proved. *State v. McLean*, 74 N.C. App. 224, 328 S.E.2d 451 (1985), appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

Applied in *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983); *State v. Norfleet*, 65 N.C. App. 355, 309 S.E.2d 260 (1983); *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1983); *State v. Roberts*, 310 N.C. 428, 312 S.E.2d 477 (1984); *State v. Bean*, 66 N.C. App. 86, 310 S.E.2d 421 (1984); *State v. Godwin*, 67 N.C. App. 731, 314 S.E.2d 265 (1984); *State v. Snyder*, 70 N.C. App. 335, 319 S.E.2d 668 (1984); *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984); *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984); *State v. Clark*, 71 N.C. App. 55, 322 S.E.2d 176 (1984); *State v. Taylor*, 80 N.C. App. 500, 342 S.E.2d 539 (1986).

Quoted in *State v. Covington*, 317 N.C. 127, 343 S.E.2d 524 (1986); *State v. Blake*, 83 N.C. App. 77, 349 S.E.2d 78 (1986).

Cited in *State v. Black*, 308 N.C. 736, 303 S.E.2d 804 (1983); *State v. Bush*, 78

N.C. App. 686, 338 S.E.2d 590 (1986); *State v. Mabe*, — N.C. App. —, 355 S.E.2d 186 (1987).

II. EXPRESSION OF OPINION.

A. In General.

An expression of judicial leaning is absolutely prohibited regardless of the manner in which it is expressed. *State v. Morrison*, 63 N.C. App. 125, 303 S.E.2d 849 (1983).

Whether Directly or Indirectly, etc. —

Because of his exalted station and the respect for his opinion which jurors are presumed to hold, the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause. It is of no consequence whether the opinion of the trial judge is conveyed to the jury directly or indirectly. *State v. Morrison*, 63 N.C. App. 125, 303 S.E.2d 849 (1983).

Where the trial court merely advised the jurors that the recollection of others differed from his own recollection of the evidence and that, in any event, the jurors should rely entirely on their own recollections of the evidence, the trial court did not impermissibly express an opinion as to the evidence. *State v. Sowell*, 80 N.C. App. 465, 342 S.E.2d 541, rev'd on other grounds, 318 N.C. 640, 350 S.E.2d 363 (1986).

F. Rulings on Witnesses and Evidence.

Comment before Jury on Objection to State's Request for Instructions. — It was not prejudicial error for the trial judge to comment before the jury that the defendants' lawyers had objected to the State's request to give additional instructions on intent, where, while it may have been better practice to have simply noted the objections in the record, the defendants have failed to establish how they might have been prejudiced by the court's remarks, the judge's comments did not convey to the jury the "impression of judicial leaning." *State v. Nealy*, 64 N.C. App. 663, 308 S.E.2d 343 (1983), cert. denied, 310 N.C. 155, 311 S.E.2d 295 (1984).

G. Weight and Credibility of Testimony, etc.

Opinion as to Weight of Evidence, etc. —

A trial court is prohibited from expressing an opinion upon the weight and

credibility of the evidence during trial or during the course of instructions to the jury. Moreover, a trial court should state the facts to the jury and avoid drawing conclusions for members of the jury. *State v. Hosey*, 79 N.C. App. 196, 339 S.E.2d 414, modified and aff'd, 318 N.C. 330, 348 S.E.2d 805 (1986).

When evidence is competent for one purpose, but not for another, the party against whom it is offered is entitled, upon request, to have the jury instructed to consider it only for the purposes for which it is competent. *State v. Foster*, 63 N.C. App. 531, 306 S.E.2d 126 (1983).

III. JURY INSTRUCTIONS.

A. In General.

Required Explanation. —

In accord with 8th paragraph in original. See *State v. McLean*, 74 N.C. App. 224, 328 S.E.2d 451 (1985), appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

Charge to the jury, etc. —

In accord with 5th paragraph in original. See *State v. Hockett*, 309 N.C. 794, 309 S.E.2d 249 (1983).

Nor upon Subject Not Supported, etc. —

To determine whether an instruction should be given, the court must consider whether there is any evidence in the record which would convince a rational trier of fact to convict the defendant of the offense. *State v. Moore*, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, 315 N.C. 188, 337 S.E.2d 862 (1985).

And in Context of Trial. —

Instructions must be construed contextually and isolated portions will not be held prejudicial when the charge as a whole is correct. *State v. Lilley*, 78 N.C. App. 100, 337 S.E.2d 89 (1985), discretionary review denied as to additional issues, 316 N.C. 199, 341 S.E.2d 582 (1986).

In determining whether an instruction requested by defendant is supported by evidence, and therefore should be given, at least in substance, the evidence must be interpreted in the light most favorable to him. In making this determination the trial judge is concerned only with the sufficiency of the evidence; its credibility is for the jury to determine, not the court. *State v. Ataei-Kachuei*, 68 N.C. App. 209, 314 S.E.2d 751, cert. denied, 311 N.C. 763, 321 S.E.2d 146 (1984).

Circumstantial Evidence. — A jury instruction as to the effect of circumstantial evidence should be given only when there is no direct evidence. If either the State or the defendant elicits direct evidence bearing on any issue for the jury's determination, then such an instruction is not appropriate. *State v. Bates*, 309 N.C. 528, 308 S.E.2d 258 (1983).

C. Explanation of Law.

3. Lesser and Included Offenses.

When Instruction on Included Offense Required. —

In accord with 7th paragraph in main volume. See *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985); *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985).

Failure to Submit Lesser Degrees. —

Instructions on the lesser included offenses of first-degree rape are warranted only when there is some doubt or conflict concerning the crucial element of penetration. *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985).

Instruction on Included Offense Held Not Required. —

Where the State's evidence is clear and positive as to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the judge to refuse to instruct on the lesser offense. *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985).

When the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense. *State v. Williams*, 314 N.C. 337, 333 S.E.2d 708 (1985).

Instruction on Included Offense Held Required. — Since a rational trier of fact could have found that the drugged and intoxicated defendant did not form an intent to commit larceny before breaking and entering, the trial court prejudicially erred in failing to instruct on misdemeanor breaking and entering. *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985).

D. Summary of Evidence.

Judge is not bound to recapitulate all the evidence, etc. —

In accord with 3rd paragraph in origi-

nal. See *State v. McLean*, 74 N.C. App. 224, 328 S.E.2d 451 (1985), appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

This section requires the trial court to summarize the evidence of both parties only to the extent necessary to explain the application of the law to the evidence. *State v. Carter*, 74 N.C. App. 437, 328 S.E.2d 607, cert. denied, 314 N.C. 333, 333 S.E.2d 491 (1985).

Verbatim Recital Not Required. —

In accord with main volume. See *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, cert. denied, — U.S. —, 107 S. Ct. 241, 93 L. Ed. 2d 165 (1986).

Judge is not required, etc. —

This section does not require the trial judge in his charge to recite verbatim, repeat, recount, or recapitulate the testimony of each witness. Such repetition would be redundant to a juror's ears and lengthen jury instructions unnecessarily. The judge's duty is performed when he summarizes only so much of the evidence as is necessary for him to apply the law. *State v. Webster*, 71 N.C. App. 321, 322 S.E.2d 421 (1984).

It is sufficient for the trial judge, etc. —

A trial judge need only summarize the evidence to the extent necessary to apply the law relevant to the case. *State v. Owens*, 65 N.C. App. 107, 308 S.E.2d 494 (1983).

Recapitulation of the Principal Features, etc. —

Under this section it is the duty of the court to instruct the jury on all substantial features of a case, but this duty extends only to those features which are raised by the evidence. *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986).

Taking More Time to Summarize, etc. — When a defendant offers no evidence or very little evidence at trial, recapitulation of the evidence for the State must necessarily take longer than recapitulation of the evidence for the defendant, and such difference does not alone violate the trial judge's obligation under this section to not express an opinion whether a fact has been proved. *State v. Paige*, 316 N.C. 630, 343 S.E.2d 848 (1986).

Evidence Tending to Impeach. —

Testimony which merely tends to impeach or show bias is not substantive in nature and need not be summarized. *State v. Abdullah*, 309 N.C. 63, 306 S.E.2d 100 (1983); *State v. Carter*, 74 N.C. App. 437, 328 S.E.2d 607, cert. de-

nied, 314 N.C. 333, 333 S.E.2d 491 (1985).

Summary of Evidence Favorable to Defendant Who Offers None. —

In accord with original. See *State v. Carter*, 74 N.C. App. 437, 328 S.E.2d 607, cert. denied, 314 N.C. 333, 333 S.E.2d 491 (1985).

Evidence favorable to defendant elicited on cross-examination that tends to exculpate defendant is substantive evidence. A trial court cannot adequately explain the application of the law to the evidence in such a case without mentioning the exculpatory evidence elicited by defendant on cross-examination. *State v. Carter*, 74 N.C. App. 437, 328 S.E.2d 607, cert. denied, 314 N.C. 333, 333 S.E.2d 491 (1985).

Objection to Slight Inaccuracies, etc. —

In accord with 4th paragraph in the main volume. See *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, cert. denied, — U.S. —, 107 S. Ct. 241, 93 L. Ed. 2d 165 (1986).

All Jurors to be in Courtroom for Request to Review Testimony. —

Both Art. I, § 24 of the North Carolina Constitution and § 15A-1233(a) require the trial court to summon all jurors into the courtroom before hearing and addressing a jury request to review testimony and to exercise its discretion in denying or granting the request. Failure of the trial court to comply with these statutory mandates entitles defendant to press these points on appeal, notwithstanding a failure to object at trial. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

E. Subordinate Features of Case.

Since It Is Not Required. —

In accord with 2nd paragraph in original. See *State v. Saunders*, 64 N.C. App. 350, 307 S.E.2d 197 (1983).

F. Instructions as to Particular Offenses.

Charge on Involuntary Manslaughter. — Where the record in a first-degree murder prosecution contained no evidence which tended to show that the victim died as the result of an

unlawful act not amounting to a felony or as the result of an unlawful act that was not naturally dangerous to human life, it was error to permit the jury to consider an involuntary manslaughter charge, and since it appeared that there was a reasonable possibility that the defendant would have been acquitted if the involuntary manslaughter issue had not been submitted, the error had to be held prejudicial. *State v. Ataei-Kachuei*, 68 N.C. App. 209, 314 S.E.2d 751, cert. denied, 311 N.C. 763, 321 S.E.2d 146 (1984).

G. Miscellaneous Instructions.

Reasonableness of Detention of Homicide Victim. —

Defendant was entitled to requested instruction concerning the reasonableness of his armed detention of homicide victim only if there was evidence that: (1) defendant had probable cause to believe that one or more of the crimes enumerated in § 15A-404(b) had been committed; (2) defendant was trying to "detain" the offender until the police arrived; and (3) the manner of detention was reasonable under the circumstances. *State v. Ataei-Kachuei*, 68 N.C. App. 209, 314 S.E.2d 751, cert. denied, 311 N.C. 763, 321 S.E.2d 146 (1984).

Instruction that Defendant Was "Scared and Confused" Held Not Required. — Taking the victim's car "while scared and confused" in order to escape the scene of a murder does not mean that defendant would not be guilty of armed robbery. The trial court would not err in failing to so instruct the jury. This evidence is not necessarily exculpatory, even if it is believed. *State v. Webb*, 309 N.C. 549, 308 S.E.2d 252 (1983).

I. Error in Instructions.

Failure to instruct upon a substantive, etc. —

Failure of the court to correctly instruct the jury on substantial features of case arising on the evidence was error for which defendant is entitled to a new trial. *State v. Watson*, 80 N.C. App. 103, 341 S.E.2d 366 (1986).

§ 15A-1233. Review of testimony; use of evidence by the jury.

CASE NOTES

This statute imposes two duties upon trial court when it receives request from jury to review evidence. First, the court must conduct all jurors to the courtroom. Second, the trial court must exercise its discretion in determining whether to permit requested evidence to be read to or examined by the jury together with other evidence relating to the same factual issue. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

All Jurors to Be In Courtroom for Request To Review Testimony. — Both Art. I, § 24 of the North Carolina Constitution and subsection (a) require the trial court to summon all jurors into the courtroom before hearing and addressing a jury request to review testimony and to exercise its discretion in denying or granting the request. Failure of the trial court to comply with these statutory mandates entitles defendant to press these points on appeal, notwithstanding a failure to object at trial. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

While the statute does not expressly say that the trial judge must have the jurors conducted to the courtroom, the legislature intended to place this responsibility on the judge presiding at the trial. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

The statute means that all jurors must be present not only when the request is made, but also when the trial court responds to the request, whatever that response might be. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

For the trial court to hear the jury foreman's inquiry and to respond to it without first requiring the presence of all jurors was an error in violation of this section. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

Trial judge has sole discretion to decide matter of whether to grant jury's request for restatement of evidence. *State v. Burgin*, 313 N.C. 404, 329 S.E.2d 653 (1985).

Instructions, as read in their entirety, that the jury, all 12 members, was to use their own memories, was not an abuse of the trial judge's discretion. *State v.*

Burgin, 313 N.C. 404, 329 S.E.2d 653 (1985).

It is error to allow the jury to take evidence into the jury room over a party's objection. *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

The consent of all parties is required before the jury may take evidence to the jury room. *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

Court Not Exercising Discretion Entitled Defendant To New Trial. — The trial court's errors in not exercising its discretion in determining whether to permit the jury to review some of the evidence and in hearing the foreman's request and responding to it in the absence of the remaining jurors, entitled defendant to a new trial. *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

The trial court erred in not exercising its discretion in denying the request to review testimony, where he said, "There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence. . . ." *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985).

Where the trial judge did not exercise his discretion in denying the jury's request to rehear testimony of the only witness to identify defendant as the perpetrator, but denied the request because he felt that he could not grant it, the trial court's failure to exercise its discretion constituted reversible error. *State v. Thompson*, 83 N.C. App. 42, 348 S.E.2d 605 (1986).

Standard of Review on Appeal. —

In accord with main volume. See *State v. Green*, 77 N.C. App. 429, 335 S.E.2d 176 (1985).

Admission of implicating statement held to be error. — The court erred in allowing witness' statement, which was inadmissible and which directly implicated defendant, to go into the jury room over defendant's objection and this error was sufficiently prejudicial to warrant a new trial for defendant on all charges. *State v. Platt*, — N.C. App. —, 354 S.E.2d 332 (1987).

Applied in *State v. McDermott*, 68 N.C. App. 786, 316 S.E.2d 93 (1984); *State v. Gilliam*, 71 N.C. App. 83, 321 S.E.2d 553 (1984); *State v. Albert*, 312

N.C. 567, 324 S.E.2d 233 (1985); *Nelson v. Patrick*, 73 N.C. App. 1, 326 S.E.2d 45 (1985); *State v. Wilson*, 73 N.C. App. 398, 326 S.E.2d 360 (1985).

§ 15A-1234. Additional instructions.

CASE NOTES

Discretion of Court. — The trial court is in the best position to determine whether further additional instruction will aid or confuse the jury in its deliberations, or if further instruction will prevent or cause in itself an undue emphasis being placed on a particular portion of the court's instructions. *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986).

Judge is not required to repeat instructions which have been previously given to the jury in the absence of some error in the charge. Needless repetition is undesirable and has been held erroneous on occasion. *State v. Hockett*, 309 N.C. 794, 309 S.E.2d 249 (1983).

Court is not required to repeat instructions which were previously given to the jury in the absence of some error in the charge but may do so in its discretion. *State v. Bartow*, 77 N.C. App. 103, 334 S.E.2d 480 (1985).

Failure to Answer Question as to Whether Particular Element Proved.

— Where the jury had some question as to whether the State had proved beyond a reasonable doubt that the perpetrator of a sexual offense was armed with a dangerous or deadly weapon, and thus, they were inquiring as to the effect of such a finding upon their determination

of guilt on the various offenses charged, it was prejudicial error for the trial judge not to answer jury questions on this point. *State v. Hockett*, 309 N.C. 794, 309 S.E.2d 249 (1983).

Correction of Instruction. — Although the trial judge did not instruct the jury in his original instruction that they could consider the purpose of facilitating flight, that omission was error favorable to the defendant where the indictment and the evidence both supported the instruction, and it was therefore not error for the trial judge to correct his instruction before the jury rendered its verdict on the kidnapping charge, as the State was entitled to the instruction and the instruction did not in any way change any instructions discussed at the charge conference. *State v. Mason*, 317 N.C. 283, 345 S.E.2d 195 (1986).

Where the jury specifically requested clarification of elements of first degree murder only, the trial court did not abuse its discretion in refusing to reinstruct on second degree murder pursuant to defendant's request. *State v. Prevette*, 317 N.C. 148, 345 S.E.2d 159 (1986).

Cited in *State v. Southern*, 71 N.C. App. 563, 322 S.E.2d 617 (1984).

§ 15A-1235. Length of deliberations; deadlocked jury.

Legal Periodicals. —

For survey of 1982 law on Criminal

Procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

I. GENERAL CONSIDERATION.

Section Provides Standards, etc. —

In accord with main volume. See *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986).

Mere failure to follow the form instructions of this section is not in it-

self reversible error. *State v. Sanders*, 81 N.C. App. 438, 344 S.E.2d 592, cert. denied, 318 N.C. 419, 349 S.E.2d 604 (1986).

Inquiry as to Jury's Division. — The trial court did not coerce a verdict by his inquiry as to the jury's division. The making of such an inquiry lies

within the sound discretion of the trial judge. *State v. Mann*, 317 N.C. 164, 345 S.E.2d 365 (1986).

In deciding whether instructions have had the effect of coercing a verdict, the court will consider the circumstances under which the instructions were given and the probable impact of the instructions on the jury. *State v. Sanders*, 81 N.C. App. 438, 344 S.E.2d 592, cert. denied, 318 N.C. 419, 349 S.E.2d 604 (1986).

Giving of Some Instructions under Subsections (a) or (b) Necessitates Giving All. — When a trial judge attempts to give any of the instructions of subsections (a) and (b) of this section to a deadlocked jury, he must give all those instructions. However, where defendant did not object at trial, the evidence of defendant's guilt was very strong, and the instructions given were in substantial conformity with the statute, the error committed did not amount to "plain error". *State v. Logan*, 79 N.C. App. 420, 339 S.E.2d 449, cert. denied, 316 N.C. 383, 342 S.E.2d 903 (1986).

Whenever the trial judge gives the jury any of the instructions authorized by subsection (b) of this section, whether given before the jury initially retires for deliberation or after the trial judge concludes that the jury is deadlocked, he must give all of them. *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986).

Trial judge committed error when, after forming the opinion that the jury was deadlocked, he gave the instructions set out in subdivisions (b)(1) and (b)(2) of this section, but failed to give the instructions set out in (b)(3) and (b)(4). *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986), holding, however, that this error was not "plain error" entitling defendant to a new trial.

Instruction under Subsection (c) within Discretion of Trial Judge. — It is clearly within the sound discretion of the trial judge as to whether to give an instruction pursuant to subsection (c) of this section. *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986).

Instruction Pursuant to Subsection (c) Held Not Prejudicial. — Any error in the court's decision to instruct the jury pursuant to subsection (c), where the charge was given during a

break in the deliberations, and no inquiry was made nor indication given as to the numerical division of the jury, was not prejudicial to defendant, even though the jury had been deliberating less than two hours and there was no indication that the jury was deadlocked. *State v. Adams*, — N.C. App. —, 354 S.E.2d 338 (1987).

Verbatim Adherence to Section, etc. —

In accord with main volume. See *State v. Moore*, 77 N.C. App. 553, 335 S.E.2d 535 (1985), cert. granted, 315 N.C. 595, 341 S.E.2d 35, aff'd, 317 N.C. 144, 343 S.E.2d 430 (1986).

Discretion of Trial Judge. —

In accord with 2nd paragraph in original. See *State v. Hall*, 73 N.C. App. 101, 325 S.E.2d 639 (1985).

Trial judge has no right to coerce a verdict. —

In accord with main volume. See *State v. Moore*, 77 N.C. App. 553, 335 S.E.2d 535 (1985), cert. granted, 315 N.C. 595, 341 S.E.2d 35, aff'd, 317 N.C. 144, 343 S.E.2d 430 (1986).

And in Context of, etc. —

In accord with original. See *State v. Peek*, 313 N.C. 266, 328 S.E.2d 249 (1985).

Applied in *State v. Bunn*, 66 N.C. App. 187, 310 S.E.2d 792 (1984); *State v. Fowler*, 312 N.C. 304, 322 S.E.2d 389 (1984).

Stated in *State v. O'Neal*, 67 N.C. App. 65, 312 S.E.2d 493 (1984).

Cited in *State v. McEntire*, 71 N.C. App. 720, 323 S.E.2d 439 (1984); *State v. Mann*, 77 N.C. App. 654, 335 S.E.2d 772 (1985).

III. COMMENT ON EXPENSE OF RETRIAL.

Instruction Held Error. —

Where not only did the trial judge have a statement from the foreman that the jury was unable to reach a verdict, but in addition the court was advised of the 11 to one numerical division of the jury, his instruction which clearly mentioned the potential inconvenience and use of the court's time incident to the jury's failure to reach a verdict constituted prejudicial error. *State v. Johnson*, 80 N.C. App. 311, 341 S.E.2d 770 (1986).

§ 15A-1236. Admonitions to jurors; regulation and separation of jurors.

CASE NOTES

Counsel for defendant must object, etc. —

While subdivision (a)(4) of this section requires the trial judge to admonish jurors to avoid contact with any accounts of the trial outside the courtroom, and the trial judge's failure to do so was error, defendant must show prejudice, and furthermore, he must object to any failure to properly instruct the jury. *State v. Harris*, 315 N.C. 556, 340 S.E.2d 383 (1986).

Exposure of the jury to a newspa-

per article that contained an account of most of the testimony offered during the voir dire hearing on the previous day as to whether to allow the testimony of a police officer as to defendant's statement to him was not so prejudicial to the defendant as to require a new trial, since the defendant himself placed information substantially similar to that contained in the article before the jury during the course of the trial. *State v. Langford*, — N.C. —, 354 S.E.2d 518 (1987).

§ 15A-1237. Verdict.

CASE NOTES

Submission of Issue in the Disjunctive. — Submission of an issue to the jury in the disjunctive is reversible error if it renders the issue ambiguous and thereby prevents the jury from reaching a unanimous verdict. *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986).

A verdict of guilty following submission in the disjunctive of two or more possible crimes to the jury in a single issue is ambiguous and therefore fatally defective. *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986).

By instructing the jury that it could find defendant guilty of trafficking in marijuana if it found that defendant knowingly possessed or knowingly transported 10,000 pounds or more of marijuana, the trial judge submitted two possible crimes to the jury, as the jury could find defendant guilty if it found

that he committed either or both of the crimes submitted to it. Thus, the jury's verdict of guilty was fatally defective because it was ambiguous, depriving defendant of his constitutional right to be convicted by a unanimous jury. *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986).

Written Verdict Not Required, etc. —

There is no requirement that the written verdict contain each and every element of the subject offense. It is sufficient if the verdict can be properly understood by reference to the indictment, evidence and jury instructions. *State v. Connard*, 81 N.C. App. 327, 344 S.E.2d 568 (1986).

Applied in *State v. Staley*, 71 N.C. App. 286, 321 S.E.2d 551 (1984).

§ 15A-1238. Polling the jury.

CASE NOTES

Right to Have Jury Polled. — This section gives any party the right to have the jury polled after a verdict is returned before the jury has dispersed. *State v. Baynard*, 79 N.C. App. 559, 339 S.E.2d 810 (1986).

This section does not give defendant a right to an unlimited number

of polls. *State v. Martin*, 315 N.C. 667, 340 S.E.2d 326 (1986).

Waiver of Right to Poll. —

In accord with main volume. See *State v. Baynard*, 79 N.C. App. 559, 339 S.E.2d 810 (1986).

Request for Repolling Properly Denied. — Defendant's request for a repolling of the jury, occasioned by the

attempt of the forelady to change her vote based on testimony presented at the sentencing phase of the trial, was correctly denied, as a juror may not impeach the verdict of the jury after it has been rendered and received in open court, and defendant's request to repoll

the jury amounted to an attempt to impeach the jury's verdict. *State v. Martin*, 315 N.C. 667, 340 S.E.2d 326 (1986).

Applied in *State v. Clark*, 73 N.C. App. 277, 326 S.E.2d 637 (1985); *State v. Mutakbbic*, 317 N.C. 264, 345 S.E.2d 154 (1986).

§ 15A-1240. Impeachment of the verdict.

CASE NOTES

Applicability. — This section applies only to criminal cases and has no applicability to a paternity proceeding. *Smith v. Price*, 315 N.C. 523, 340 S.E.2d 408 (1986).

Subsection (c), etc. —

In accord with the main volume. See *State v. Costner*, 80 N.C. App. 666, 343 S.E.2d 241, appeal dismissed and cert. denied, 317 N.C. 709, 347 S.E.2d 444 (1986).

Observation of Codefendant in Handcuffs Prior to Defendant's Trial. — Affidavit of one of defendant's jurors, which stated that before defendant's trial some of defendant's jurors observed codefendant, who was tried separately, emerging from courtroom in

handcuffs and assumed he had been convicted, did not contain any information permitted by subdivisions (c)(1) or (c)(2) of this section. *State v. Ysaguirre*, 309 N.C. 780, 309 S.E.2d 436 (1983).

Affidavits of three jurors, asserting that the jury's verdict, as reported by the foreman, was not a true verdict, but represented their answer to the foreman's question of whether defendant might have been guilty of some other like offense, but that all 12 jurors, when polled, agreed with the verdict of guilty, were not admissible to impeach the verdict. *State v. Costner*, 80 N.C. App. 666, 343 S.E.2d 241, appeal dismissed and cert. denied, 317 N.C. 709, 347 S.E.2d 444 (1986).

§ 15A-1241. Record of proceedings.

CASE NOTES

Applied in *State v. Colbert*, 65 N.C. App. 762, 310 S.E.2d 145 (1984).

Quoted in *State v. Watts*, 77 N.C. App. 124, 334 S.E.2d 400 (1985).

Cited in *State v. Wallace*, 309 N.C. 141, 305 S.E.2d 548 (1983).

§ 15A-1242. Defendant's election to represent himself at trial.

CASE NOTES

The provisions of this section are mandatory in every case where an accused requests to proceed pro se. *State v. Michael*, 74 N.C. App. 118, 327 S.E.2d 263 (1985); *State v. Lyons*, 77 N.C. App. 565, 335 S.E.2d 532 (1985); *State v. White*, 78 N.C. App. 741, 338 S.E.2d 614 (1986).

The inquiry required by this section is mandatory and must be made in every case in which a defendant elects to proceed without counsel. *State v. Callahan*,

— N.C. App. —, 350 S.E.2d 128 (1986), cert. denied, — N.C. —, 353 S.E.2d 409 (1987).

Compliance with this section fully satisfies, etc. —

In accord with the main volume. See *State v. Wells*, 78 N.C. App. 769, 338 S.E.2d 573 (1986).

Applicability of Section. — Nothing in this section makes it inapplicable to defendants who are magistrates, attorneys or judges. Inquiry under this sec-

tion is necessary whenever a defendant either implicitly or explicitly indicates a desire to waive the right to counsel. *State v. Bullock*, 316 N.C. 180, 340 S.E.2d 106 (1986).

A written waiver of counsel is no substitute for actual compliance by the trial court with this section. *State v. Wells*, 78 N.C. App. 769, 338 S.E.2d 573 (1986).

What Record Must Show. —

Absent evidence that defendant was informed of the nature of the charges and the range of permissible punishments or that he understood and appreciated the consequences of proceeding without counsel, the court should not permit him to proceed pro se. *State v. Graham*, 76 N.C. App. 470, 333 S.E.2d 547 (1985); *State v. Gordon*, 79 N.C. App. 623, 339 S.E.2d 836 (1986).

The record must affirmatively show that the inquiry required by this section was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will. *State v. Callahan*, — N.C. App. —, 350 S.E.2d 128 (1986), cert. denied, — N.C. —, 353 S.E.2d 409 (1987).

Failure to Conduct Inquiry. —

Where defendant employed counsel who were ready to proceed to trial and in fact demanded trial when the State requested a second continuance, but thereafter, when differences between defendant and his counsel necessitated counsel's withdrawal, defendant attempted to employ other counsel but understandably could not find anyone who would attempt to defend him, with only a few days' preparation time, on charges as serious as the ones he faced, it was prejudicial error for the trial court to proceed to trial without conducting the statutory inquiry in order to clearly establish whether defendant voluntarily, knowingly and intelligently waived his right to counsel. *State v. Bullock*, 316 N.C. 180, 340 S.E.2d 106 (1986).

In the absence of (1) a clear indication by defendant that he wished to proceed pro se, and (2) the inquiry required by this section, it was error to permit defendant to go to trial without the assistance of counsel. *State v. White*, 78 N.C. App. 741, 338 S.E.2d 614 (1986).

Absent a clear indication by defendant that he desired to proceed pro se, and absent the inquiries required by this section, the court erred in requiring defendant to proceed pro se at suppression

hearing. *State v. Gordon*, 79 N.C. App. 623, 339 S.E.2d 836 (1986).

When there is no evidence in the record that the trial court, on defendant's waiver of counsel, made a thorough inquiry sufficient to comport with the dictates of this section, due process requirements have not been met. And where the court signs a certification indicating that this procedure has been followed, but the record belies that fact, the waiver will be invalidated. *State v. Warren*, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

Remand for Noncompliance. —

Where the record reflected that this section was not complied with, the judgment would be vacated and the case remanded for a determination of whether defendant was entitled to have counsel appointed to represent her. *State v. Wells*, 78 N.C. App. 769, 338 S.E.2d 573 (1986).

Standby Counsel Not a Satisfactory Substitute. — Neither the statutory responsibilities of standby counsel under § 15A-1243, nor the actual participation of standby counsel, is a satisfactory substitute for the right to counsel in the absence of a knowing and voluntary waiver. *State v. Dunlap*, 318 N.C. 384, 348 S.E.2d 801 (1986).

New Trial Where Judge Did Not Advise Defendant. — Where the trial judge did not advise defendant of the consequences of her decision to proceed pro se, or the nature of the charges and proceedings and the range of permissible punishments, defendant was entitled to a new trial. *State v. Lyons*, 77 N.C. App. 565, 335 S.E.2d 532 (1985).

Where the trial judge failed to make the inquiry mandated by this section before permitting the defendant to proceed to trial without counsel, the defendant was entitled to a new trial. *State v. Dunlap*, 318 N.C. 384, 348 S.E.2d 801 (1986).

New Trial Where Proceedings Were Not Recorded. — Although the State noted in its brief that the trial judge addressed defendant pursuant to this section, where the proceedings were not recorded by the court reporter, so that the record was silent as to what questions were asked of defendant and what his responses were, defendant was entitled to a new trial. *State v. Callahan*, — N.C. App. —, 350 S.E.2d 128 (1986), cert. denied, — N.C. —, 353 S.E.2d 409 (1987).

Having refused to cooperate with

appointed counsel and chosen to represent himself, defendant could not later complain that he was entitled to substitute counsel because he would not cooperate with the first one. *State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986).

Fact that defendant chose to represent himself only because trial court refused to appoint substitute counsel did not constitute a violation of his constitutional rights, as an indigent defendant has the right to appointed counsel, but not to counsel of his choice. *State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986).

Judgment Vacated Where Transcript Showed Failure to Follow Pro-

cedure. — Where although the court signed a certification indicating that the procedure set out under this section had been followed, the transcripts, taken at the time the waiver was signed and at the time at which defendant entered his guilty plea, show that the proper procedure was not followed, the judgment entered would be vacated and the case would be remanded for a determination of whether defendant was entitled to have counsel appointed to represent him in the action. *State v. Hardy*, 78 N.C. App. 175, 336 S.E.2d 661 (1985).

Applied in *State v. McCrowre*, 312 N.C. 478, 322 S.E.2d 775 (1984).

Cited in *State v. Luker*, 65 N.C. App. 644, 310 S.E.2d 63 (1983).

§ 15A-1243. Standby counsel for defendant representing himself.

CASE NOTES

Standby Counsel Not Sufficient Absent Voluntary Waiver of Right to Counsel. — Neither the statutory responsibilities of standby counsel under this section, nor the actual participation of standby counsel, is a satisfactory substitute for the right to counsel in the ab-

sence of a knowing and voluntary waiver. *State v. Dunlap*, 318 N.C. 384, 348 S.E.2d 801 (1986).

Applied in *State v. Luker*, 65 N.C. App. 644, 310 S.E.2d 63 (1983).

Cited in *State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986).

SUBCHAPTER XIII. DISPOSITION OF DEFENDANTS.

ARTICLE 78.

Order of Commitment to Imprisonment.

§ 15A-1301. Order of commitment to imprisonment when not otherwise specified.

CASE NOTES

Cited in *State v. Tozzi*, — N.C. App. —, 353 S.E.2d 250 (1987).

ARTICLE 80.

*Defendants Found Not Guilty by Reason of Insanity.***§ 15A-1321. Civil commitment of defendants found not guilty by reason of insanity.**

When a defendant charged with a crime is found not guilty by reason of insanity by jury verdict or upon motion pursuant to G.S. 15A-959(c), the presiding judge upon such additional hearing, if any, as he determines to be necessary, shall determine whether there are reasonable grounds to believe the defendant meets the criteria for involuntary commitment under Part 7 of Article 5 of Chapter 122C of the General Statutes. If the presiding judge finds reasonable grounds to believe that the defendant meets the criteria, he shall make findings of fact and issue a custody order in the same manner, upon the same grounds, and with the same effect, as an order issued by a clerk or magistrate pursuant to G.S. 122C-261. Proceedings thereafter are in accordance with Part 7 of Article 5 of Chapter 122C of the General Statutes. However, if the defendant was charged with a violent crime, including a crime involving assault with a deadly weapon, the judge's custody order shall require a law-enforcement officer to take the defendant directly to a 24-hour facility as described in G.S. 122C-252; and the order must indicate that the defendant was charged with a violent crime and that he was found not guilty by reason of insanity. (1977, c. 711, s. 1; 1983, c. 380, s. 3; 1985, c. 589, s. 10; 1987, c. 596, s. 6.)

Editor's Note. —

Session Laws 1985, c. 589, s. 64 provides that prosecutions for offenses occurring before the effective date of the act (Jan. 1, 1986) are not abated or affected by the act, and that the statutes that would be applicable but for the act remain applicable to those prosecutions.

Session Laws 1985, c. 589, s. 66 provides that rules to implement the act which are authorized to be adopted by the act or which are otherwise authorized to be adopted by law may be adopted at any time after ratification (July 4, 1985), but shall not become effective before January 1, 1986.

Session Laws 1985, c. 589, s. 65 is a severability clause.

Effect of Amendments. —

The 1985 amendment, effective January 1, 1986, substituted "Part 7 of Article 5 of Chapter 122C" for "Article 5A of Chapter 122" in the first and third sentences, substituted "G.S. 122C-261 or G.S. 122C-262" for "'G.S. 122-58.3 or G.S. 122-58.18'" at the end of the second sentence, and substituted "a 24-hour facility as described in G.S. 122C-252" for "a community or regional mental health facility pursuant to G.S. 122-58.4(b)" near the middle of the last sentence.

The 1987 amendment, effective October 1, 1987, deleted "or G.S. 122C-262" at the end of the second sentence.

CASE NOTES

Applied in *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1983).

§ 15A-1322. Temporary restraint.

If the judge finds that there are reasonable grounds to believe that the defendant-respondent is mentally ill, as defined in G.S. 122C-3, and is dangerous to himself or others, and the judge determines upon appropriate findings of fact that it is appropriate to proceed under the provisions of this Article, he may order that the respondent be held under appropriate restraint pending proceedings under G.S. 15A-1321. (1977, c. 711, s. 1; 1985, c. 589, s. 12.)

Editor's Note. — Session Laws 1985, c. 589, s. 64 provides that prosecutions for offenses occurring before the effective date of the act (Jan. 1, 1986) are not abated or affected by the act, and that the statutes that would be applicable but for the act remain applicable to those prosecutions.

Session Laws 1985, c. 589, s. 66 provides that rules to implement the act which are authorized to be adopted by the act or which are otherwise autho-

rized to be adopted by law may be adopted at any time after ratification (July 4, 1985), but shall not become effective before January 1, 1986.

Session Laws 1985, c. 589, s. 65 is a severability clause.

Effect of Amendments. — The 1985 amendment, effective January 1, 1986, substituted "G.S. 122C-3" for "G.S. 122-36" and deleted "imminently" preceding "dangerous to himself or others."

ARTICLE 81.

General Sentencing Provisions.

§ 15A-1331. Authorized sentences; conviction.

CASE NOTES

The Fair Sentencing Act does not require a defendant to forego all possible defenses before he may take advantage of statutory mitigating factors.

State v. Puckett, 66 N.C. App. 600, 312 S.E.2d 207 (1984).

Cited in State v. Ataei-Kachuei, 68 N.C. App. 209, 314 S.E.2d 751 (1984).

§ 15A-1334. The sentencing hearing.

Legal Periodicals. —

For 1984 survey, "Denying Mitigating Instructions in Capital Cases on

Grounds of Relevancy," see 63 N.C.L. Rev. 1122 (1985).

CASE NOTES

I. GENERAL CONSIDERATION.

Court Need Not Ask if Defendant, etc. —

It is clear that this section, while permitting a defendant to speak at the sentencing hearing, does not require the trial court to personally address the defendant and ask him if he wishes to make a statement in his own behalf. State v. McRae, 70 N.C. App. 779, 320 S.E.2d 914 (1984), discretionary review

denied, 313 N.C. 175, 326 S.E.2d 35 (1985).

Opportunity to Prepare for Hearing. — Though the demands on the time of trial judges are very onerous, and they have broad discretion in conducting the business of the courts, the sentencing process, especially since the Fair Sentencing Act was adopted, is nevertheless an important part of any trial that must be fairly processed, and a hearing that a defendant has no opportunity to prepare for is not the kind of

hearing that the act requires. *State v. Ataei-Kachuei*, 68 N.C. App. 209, 314 S.E.2d 751, cert. denied, 311 N.C. 763, 321 S.E.2d 146 (1984).

Denial of Opportunity to Speak on Post-trial Motion. — Defendant was not denied the opportunity permitted by this section to make a statement in his own behalf where he made a statement at his sentencing hearing, and was only denied the opportunity to speak during the post-trial motion after the sentence was imposed. *State v. Newton*, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

Continuance Within Discretion, etc. —

Motion to continue sentencing hearing is addressed to the discretion of the trial judge who may grant it on good cause. *State v. Blandford*, 66 N.C. App. 348, 311 S.E.2d 338 (1984).

Good Cause Must Be Shown for Continuance. —

In accord with the main volume. See *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Applied in *State v. Withers*, 311 N.C. 699, 319 S.E.2d 211 (1984).

Stated in *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985).

Cited in *State v. Haislip*, 79 N.C. App. 656, 339 S.E.2d 832 (1986); *State v. Mercer*, 317 N.C. 87, 343 S.E.2d 885 (1986).

§ 15A-1335. Resentencing after appellate review.

CASE NOTES

Section applies to situation where trial judge is weighing aggravating and mitigating factors on resentencing a defendant or on sentencing a defendant after a new trial, and prohibits the trial judge from imposing a more severe sentence because of reweighing aggravating factors or because of new aggravating factors. *State v. Williams*, 74 N.C. App. 728, 329 S.E.2d 709 (1985).

This section did not apply on resentencing where the judge did not weigh aggravating factors but imposed the minimum sentence of 14 years prescribed by § 14-87(d). *State v. Williams*, 74 N.C. App. 728, 329 S.E.2d 709 (1985).

Manner of Consolidating Convictions May Be Changed on Remand. —

While this section prohibits trial courts from imposing stiffer sentences upon remand than were originally imposed, nothing prohibits the trial court from changing the way in which it consolidated convictions during a sentencing hearing prior to remand. *State v. Ransom*, 80 N.C. App. 711, 343 S.E.2d 232, cert. denied, 317 N.C. 712, 347 S.E.2d 450 (1986).

Resentencing Upheld. — Where defendant was originally given a 20 year prison sentence, based on 13 counts of breaking or entering and 13 counts of larceny, and after the 20 year sentence was overturned on grounds that the original sentence was in error because it consolidated crimes punishable by a maximum sentence of ten years yet sentenced defendant to 20 years in violation of § 15A-1340.4(b), defendant was sentenced to six three year prison sentences or a total of 18 years imprisonment, it was held that the trial court did not err in changing the way defendant's convictions were consolidated and that the sentence imposed did not violate this section. *State v. Ransom*, 80 N.C. App. 711, 343 S.E.2d 232, cert. denied, 317 N.C. 712, 347 S.E.2d 450 (1986).

Applied in *State v. Smith*, 73 N.C. App. 637, 327 S.E.2d 44 (1985); *State v. Hanes*, 77 N.C. App. 222, 334 S.E.2d 444 (1985); *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985).

Cited in *State v. Lowery*, 318 N.C. 54, 347 S.E.2d 729 (1986).

ARTICLE 81A.

Sentencing Persons Convicted of Felonies.

§ 15A-1340.1. Applicability of Article 81A; life sentence.

Legal Periodicals. —

For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

For comment on the North Carolina Fair Sentencing Act, see 14 N.C. Cent. L.J. 517 (1984).

For survey, "Using the Fair Sentencing Act to Protect the Criminal Defendant," see 9 Campbell L. Rev. 127 (1986).

CASE NOTES

The Fair Sentencing Act originated in a movement away from indeterminate sentencing and toward the imposition of presumptive terms for specified crimes. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

The Fair Sentencing Act is an attempt to strike a balance between the inflexibility of a presumptive sentence which insures that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984); *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Application of Article. —

The Fair Sentencing Act clearly mandates that the act is applicable only to felonies that occur on or after July 1, 1981. Therefore, it is error for trial judge to aggravate a charge on the basis of evidence relating to a pre-Act crime. *State v. Jones*, 66 N.C. App. 274, 311 S.E.2d 351 (1984).

The Fair Sentencing Act was not intended to remove all discretion from the trial judges. The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony. *State v. Thompson*, 310 N.C. 274, 311 S.E.2d 866 (1984).

The trial judge still has discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within his

sound discretion. *State v. Thompson*, 310 N.C. 274, 311 S.E.2d 866 (1984).

For the purposes of sentencing under the Fair Sentencing Act, a preponderance of the evidence does not mean number of witnesses or volume of testimony, but refers to the reasonable impression made upon the mind of the sentencing judge by the entire evidence, taking into consideration the character and demeanor of the witnesses, their interest or bias and means of knowledge, and other attending circumstances. *State v. Atkins*, 66 N.C. App. 67, 310 S.E.2d 629, rev'd on other grounds, 311 N.C. 272, 316 S.E.2d 306 (1984).

The Fair Sentencing Act does not require a defendant to forego all possible defenses before he may take advantage of the statutory mitigating factors. *State v. Puckett*, 66 N.C. App. 600, 312 S.E.2d 207 (1984).

The trial court should find nonstatutory mitigating factor when defense counsel has made specific request therefor, and when the evidence is substantial, uncontradicted and manifestly credible. *State v. Corley*, 75 N.C. App. 245, 330 S.E.2d 819, supersedeas granted, 314 N.C. 119, 332 S.E.2d 485, appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

Judging relative weight of aggravating and mitigating factors. — A sentencing judge properly may determine in appropriate cases that one factor in aggravation outweighs more than one factor in mitigation and vice versa. *State v. Daniels*, — N.C. —, 355 S.E.2d 136 (1987).

A trial judge's weighing of mitigating and aggravating factors will not be disturbed on appeal absent a showing that

the judge abused his discretion. *State v. Daniels*, — N.C. —, 355 S.E.2d 136 (1987).

The weight to be given any particular aggravating or mitigating factor rests in the trial court's sound discretion, and the balance struck by the court will not be disturbed if there is support in the record for the determination. *State v. Corley*, 75 N.C. App. 245, 330 S.E.2d 819, supersedeas granted, 314 N.C. 119, 332 S.E.2d 485, appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

Consolidated Offenses. — In order to support a sentence for consolidated offenses varying from the presumptive, each offense had to be treated by the trial court separately, and separately supported by findings tailored to the individual offense and applicable only to that offense. *State v. Corley*, 75 N.C. App. 245, 330 S.E.2d 819, supersedeas granted, 314 N.C. 119, 332 S.E.2d 485, appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

A failure to make separate findings in aggravation and mitigation for each of several consolidated offenses will be deemed harmless error when the factors as found apply equally to each of the consolidated offenses. *State v. Corley*, 75 N.C. App. 245, 330 S.E.2d 819, supersedeas granted, 314 N.C. 119, 332 S.E.2d 485, appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

Discretion to Impose Consecutive or Concurrent Sentences. — Although the General Assembly did not address the issue of consecutive sentences in the Fair Sentencing Act, § 15A-1340.1 et seq., it left substantially intact § 15A-1354(a), which vests the sentencing judge with discretion to impose either consecutive or concurrent sentences. Since § 15A-1354(a) was in effect when the legislature enacted the Fair Sentencing Act, the legislature by leaving it substantially intact must have intended that the sentencing judge retain the discretion to impose sentences consecutively or concurrently. *State v. Ysaguirre*, 309 N.C. 780, 309 S.E.2d 436 (1983).

Leaving sentencing judges with unbundled discretion on the matter of whether to run multiple sentences concurrently

or consecutively conflicts with the general theory of uniformity sought by fair sentencing. Nevertheless, the legislature, in espousing both the spirit and the letter of fair sentencing in North Carolina, elected to incorporate the freedom for judges to impose consecutive sentences. Since that is the prerogative of the legislature, there is nothing inherent in consecutive sentencing which violates the Fair Sentencing Act, § 15A-1340.1 et seq. *State v. Ysaguirre*, 309 N.C. 780, 309 S.E.2d 436 (1983).

Consideration of Defendant's Prison Conduct Between Original and Resentencing Hearings. — It was reversible error for the trial court to fail to consider the defendant's prison conduct between his original sentencing hearing and his resentencing hearing, for purposes of mitigation. *State v. Corley*, 75 N.C. App. 245, 330 S.E.2d 819, supersedeas granted, 314 N.C. 119, 332 S.E.2d 485, appeal dismissed, 315 N.C. 186, 337 S.E.2d 582 (1985).

An offense is a prior conviction under the Fair Sentencing Act only if the judgment has been entered and the time for appeal has expired, or the conviction has been upheld on appeal. *State v. Southern*, 71 N.C. App. 563, 322 S.E.2d 617 (1984), *aff'd*, 314 N.C. 110, 331 S.E.2d 688 (1985).

Imposition of consecutive sentences for rape, first-degree sex offense, first-degree burglary and armed robbery violates neither the Fair Sentencing Act, § 15A-1340.1 et seq., nor any constitutional proportionality requirement. *State v. Ysaguirre*, 309 N.C. 780, 309 S.E.2d 436 (1983).

Applied in *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983); *State v. Cauthen*, 66 N.C. App. 630, 311 S.E.2d 649 (1984); *State v. Sills*, 311 N.C. 370, 317 S.E.2d 379 (1984); *State v. Wheeler*, 70 N.C. App. 191, 319 S.E.2d 631 (1984); *State v. Goodman*, 71 N.C. App. 343, 322 S.E.2d 408 (1984); *State v. Todd*, 313 N.C. 110, 326 S.E.2d 249 (1985); *State v. Jones*, 73 N.C. App. 578, 327 S.E.2d 54 (1985).

Cited in *State v. Thompson*, 64 N.C. App. 354, 307 S.E.2d 397 (1983); *State v. Ledford*, 315 N.C. 599, 340 S.E.2d 309 (1986).

§ 15A-1340.2. Definitions.

Legal Periodicals. — For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

Convictions in which prayer for judgment was continued and no fines or other conditions imposed constituted "prior convictions" under the Fair Sentencing Act. *State v. Southern*, 314 N.C. 110, 331 S.E.2d 688 (1985).

Applied in *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984); *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

Stated in *State v. Southern*, 71 N.C. App. 563, 322 S.E.2d 617 (1984).

§ 15A-1340.3. Purposes of sentencing.

Legal Periodicals. — For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

For survey, "Using the Fair Sentenc-

ing Act to Protect the Criminal Defendant," see 9 Campbell L. Rev. 127 (1986).

CASE NOTES

The Fair Sentencing Act originated in a movement away from indeterminate sentencing and toward the imposition of presumptive terms for specified crimes. However, it is not clear the extent to which the act limits the sentencing discretion of the trial judge. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

The Fair Sentencing Act is an attempt to strike a balance between the inflexibility of a presumptive sentence which insures that punishment is commensurate with the crime, without regard to the nature of the offender; and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

The Fair Sentencing Act was not intended to remove all discretion from the trial judges. The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

The trial judge still has discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within his

sound discretion. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

To allow trial court to ignore uncontradicted, credible evidence of either an aggravating or a mitigating factor would render the requirement that he consider the statutory factors meaningless, and would be counter to the objective that the punishment imposed take "into account factors that may diminish or increase the offender's culpability," as required under this section. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

An aggravating factor can properly be found only if the defendant has exhibited some behavior which serves to increase the offender's culpability. *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

It is error for aggravating factor to be based on circumstances which are part of very essence of crime, because it can be presumed that the legislature was guided by this unfortunate fact when it established presumptive sentences. *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

The Fair Sentencing Act does not specifically preclude a finding of perjury as an aggravating factor to be weighed in considering the sentence to be imposed upon a defendant, provided, of course, the finding meets the requirements of § 15A-1340.4; however,

in view of some of the potential dangers inherent in this particular factor and also of its peculiar nature, a trial judge should exercise extreme caution in this area and should refrain from finding perjury as an aggravating factor except in the most extreme case. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

Sentencing judges should not indiscriminately treat as a perjurer every convicted defendant who has testified in his own defense. Witnesses induced by sordid motives or fear have been known to fabricate accusations with such guile that even conscientious triers of fact have been misled. Moreover, some essential elements of proof of criminal conduct, such as knowledge, intent, malice, and premeditation are sometimes so subjective that testimony about them cannot be readily categorized as true or false. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

Judges must constantly bear in mind

that neither they nor jurors are infallible. A verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence. It is better in the usual case for the trial judge who suspects perjury to request an investigation. Then, if the facts warrant it, the state may institute prosecution for this separate and distinct crime. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

Applied in *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); *State v. Higson*, 310 N.C. 418, 312 S.E.2d 437 (1984); *State v. McRae*, 70 N.C. App. 779, 320 S.E.2d 914 (1984).

Stated in *State v. Eason*, 67 N.C. App. 460, 313 S.E.2d 221 (1984).

Cited in *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985); *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986); *State v. Crandall*, 83 N.C. App. 37, 348 S.E.2d 826 (1986).

§ 15A-1340.4. Presumptive punishment for felony other than Class A or Class B felony; prior felony convictions; consideration of aggravating and mitigating factors; written findings.

Legal Periodicals. —

For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

For article, "an analysis of the new North Carolina evidence code," see 20 Wake Forest L. Rev. 1 (1984).

For comment, "North Carolina's fair sentencing act: Is it fair?," see 20 Wake

Forest L. Rev. 165 (1984).

For comment on the North Carolina Fair Sentencing Act, see 14 N.C. Cent. L.J. 517 (1984).

For survey, "Using the Fair Sentencing Act to Protect the Criminal Defendant," see 9 Campbell L. Rev. 127 (1986).

CASE NOTES

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I. GENERAL CONSIDERATION.

The Fair Sentencing Act originated in a movement away from indeterminate sentencing and toward the imposition of presumptive terms for specified crimes. However, the extent to which the act limits the sentencing discretion of the trial judge is not clear. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

The Fair Sentencing Act is an attempt to strike a balance between the inflexibility of a presumptive sentence, which insures that punishment is commensurate with the crime, without regard to the nature of the offender, and the flexibility of permitting punishment to be adapted, when appropriate, to the particular offender. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

One of the primary purposes of sentencing is to impose a punishment commensurate with the injury the offense has caused, taking into consideration factors which may diminish or enhance the offender's culpability. *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986).

Article Establishes Guidelines. — This Article did not eliminate the existing discretionary system; it only establishes certain guidelines for trial judges, which if correctly observed, still leave an open door for disparity of sentences. *State v. Hinnant*, 65 N.C. App. 130, 308

S.E.2d 732 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

Duty of Judge to Examine Evidence. — A duty is placed upon the judge to examine the evidence to determine if it would support any of the statutory factors, even absent a request by counsel. *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

Legislature Determines Factors to Be Considered. — The power to determine those statutory mitigating and aggravating factors which must be considered by the sentencing judge lies solely within the discretion of the legislature. *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

Judge Must Consider Aggravating and Mitigating Factors. — Unless a sentence has been agreed to during plea bargaining, a sentencing judge is required to consider the statutory list of aggravating and mitigating factors during sentencing, of which many items concern circumstances that may surround the offense. Such circumstances might include facts concerning both a dismissed charge as well as the admitted offense. *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983).

Under subsection (a) of this section judges must consider all aggravating and mitigating factors before imposing a prison term other than the presumptive term. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Finding of Factor Required Where

Evidence Uncontradicted, Substantial and Credible. — When evidence in support of a particular mitigating or aggravating factor is uncontradicted, substantial, and there is no reason to doubt its credibility, it is error for the trial court not to find that factor. *State v. Daniel*, — N.C. —, 354 S.E.2d 216 (1987).

But this section does not require that only aggravating or mitigating factors listed therein be considered. The court may use any factors which are supported by a preponderance of the evidence and are reasonably related to the purposes of sentencing. *State v. Setzer*, — N.C. App. —, 301 S.E.2d 107 (1983).

In addition to specified factors which must be considered, the sentencing judge may consider any aggravating and mitigating factors that he finds are proved by the preponderance of the evidence, and that are reasonably related to the purposes of sentencing. It is error, however, to consider factors such that the severity of the sentence imposed relates to the defendant's plea of not guilty. *State v. Blackwood*, 60 N.C. App. 150, 298 S.E.2d 196 (1982).

All circumstances which are transactionally related to the admitted offense must be considered during sentencing. *State v. Wood*, — N.C. App. —, 300 S.E.2d 903 (1983).

As long as they are not elements essential to the establishment of the offense to which the defendant pled guilty, all circumstances which are transactionally related to the admitted offense and which are reasonably related to the purposes of sentencing must be considered during sentencing. *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983); *State v. Teague*, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

If They Are Reasonably Related to the Purposes of Sentencing. — The court can use an aggravating factor not set forth in subsection (a)(1) of this section if it reasonably relates to the purposes of sentencing. *State v. Nichols*, 66 N.C. App. 318, 311 S.E.2d 38, cert. denied, 311 N.C. 406, 319 S.E.2d 278 (1984).

The statute does not purport to grant trial judge the discretion to create new aggravating factors. Rather, the statute lists several aggravating factors which the trial judge is required to consider and also authorizes him to consider any other aggravating factors that he finds are proved by a preponderance of the ev-

idence, and that are reasonably related to the purposes of sentencing. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

But the trial judge may wish to exercise restraint when considering nonstatutory aggravating factors after having found statutory factors. This prudent course of conduct would lessen the chance of having the case remanded for resentencing. *State v. Baucom*, 66 N.C. App. 298, 311 S.E.2d 73 (1984).

Factors Must Be Supported by Preponderance of Evidence. — The trial judge may consider aggravating and mitigating factors supported by evidence not used to prove an essential element as long as those factors are reasonably related to the purposes of sentencing. Such factors must be supported by a preponderance of the evidence. *State v. Teague*, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

Absent Rebuttal, Factual Allegations in Indictment Deemed Admitted by Guilty Plea. — Where a defendant pleads guilty to an indictment which contains factual allegations which could be the basis for the finding of an aggravating circumstance, and fails to challenge or present any evidence to rebut these factual allegations, they are deemed admitted and may be utilized by the trial court to establish the existence of the aggravating factor. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985).

Defendant Who Pleads Guilty May Present Evidence. — Even where a defendant pleads guilty, he may challenge and present evidence at the sentencing hearing to rebut any factual allegations in the indictment or other criminal process which could be used to establish the existence of an aggravating circumstance. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985).

Behavior prior to Original Trial and Sentencing Hearing. — An inmate's good behavior prior to his original trial and/or sentencing hearing may be found as a nonstatutory mitigating factor, and his bad conduct during the same time frame may be found as a nonstatutory aggravating factor. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986).

Behavior Prior to Resentencing. — As § 15A-1335 prohibits the trial court from resentencing a defendant to a term of imprisonment greater than the prior sentence less the portion of the prior

sentence previously served, a trial judge in North Carolina may not consider a defendant's bad conduct during the period between his conviction and his resentencing hearing in order to increase his sentence. However, bad conduct may be found by the trial judge as a nonstatutory aggravating factor to be utilized by the judge in deciding the sentence to be imposed, so long as the new sentence is no more severe than the original one. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986).

Applied in *State v. Horne*, 59 N.C. App. 576, 297 S.E.2d 788 (1982); *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983); *State v. Shepard*, 61 N.C. App. 662, 300 S.E.2d 268 (1983); *State v. Hough*, 61 N.C. App. 132, 300 S.E.2d 409 (1983); *State v. Simpson*, 61 N.C. App. 151, 300 S.E.2d 412 (1983); *State v. Brooks*, 61 N.C. App. 752, 301 S.E.2d 421 (1983); *State v. Locklear*, 61 N.C. App. 594, 301 S.E.2d 437 (1983); *State v. Eure*, 61 N.C. App. 430, 301 S.E.2d 452 (1983); *State v. Hammonds*, 61 N.C. App. 615, 301 S.E.2d 457 (1983); *State v. Gonzalez*, 62 N.C. App. 146, 302 S.E.2d 463 (1983); *State v. Medlin*, 62 N.C. App. 251, 302 S.E.2d 483 (1983); *State v. Shane*, 309 N.C. 438, 306 S.E.2d 765 (1983); *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983); *State v. Huntley*, 62 N.C. App. 577, 303 S.E.2d 330 (1983); *State v. Cantrell*, 64 N.C. App. 207, 306 S.E.2d 555 (1983); *State v. Rivers*, 64 N.C. App. 554, 307 S.E.2d 588 (1983); *State v. Yarborough*, 64 N.C. App. 500, 307 S.E.2d 794 (1983); *State v. Jones*, 64 N.C. App. 505, 307 S.E.2d 823 (1983); *State v. Strange*, 64 N.C. App. 614, 307 S.E.2d 856 (1983); *State v. Simmons*, 64 N.C. App. 727, 308 S.E.2d 95 (1983); *State v. Oates*, 65 N.C. App. 112, 308 S.E.2d 507 (1983); *State v. Simmons*, 65 N.C. App. 294, 309 S.E.2d 493 (1983); *State v. Corley*, 310 N.C. 40, 311 S.E.2d 540 (1984); *State v. Higson*, 310 N.C. 418, 312 S.E.2d 437 (1984); *State v. Murray*, 310 N.C. 541, 313 S.E.2d 523 (1984); *State v. Cook*, 65 N.C. App. 703, 309 S.E.2d 737 (1983); *State v. McIntyre*, 65 N.C. App. 807, 310 S.E.2d 119 (1984); *State v. Simmons*, 65 N.C. App. 804, 310 S.E.2d 139 (1984); *State v. Abdullah*, 66 N.C. App. 173, 310 S.E.2d 413 (1984); *State v. Bunn*, 66 N.C. App. 187, 310 S.E.2d 792 (1984); *State v. Thompson*, 66 N.C. App. 679, 312 S.E.2d 212 (1984); *State v. Smith*, 66 N.C. App. 570, 312 S.E.2d 222 (1984); *State v. Benfield*, 67 N.C. App. 490, 313 S.E.2d

198 (1984); *State v. Goforth*, 67 N.C. App. 537, 313 S.E.2d 595 (1984); *State v. Aldridge*, 67 N.C. App. 655, 314 S.E.2d 139 (1984); *State v. Rozier*, 69 N.C. App. 38, 316 S.E.2d 893 (1984); *State v. Gardner*, 311 N.C. 489, 319 S.E.2d 591 (1984); *State v. Wheeler*, 70 N.C. App. 191, 319 S.E.2d 631 (1984); *State v. Covell*, 70 N.C. App. 490, 319 S.E.2d 689 (1984); *State v. Spears*, 70 N.C. App. 747, 321 S.E.2d 13 (1984); *State v. Harris*, 71 N.C. App. 141, 321 S.E.2d 480 (1984); *State v. Brewington*, 71 N.C. App. 435, 322 S.E.2d 205 (1984); *State v. Wester*, 71 N.C. App. 321, 322 S.E.2d 421 (1984); *State v. Albert*, 312 N.C. 567, 324 S.E.2d 233 (1985); *State v. Jones*, 72 N.C. App. 610, 325 S.E.2d 309 (1985); *State v. Sampson*, 72 N.C. App. 461, 325 S.E.2d 514 (1985); *State v. Robinson*, 72 N.C. App. 238, 326 S.E.2d 86 (1985); *State v. Isom*, 73 N.C. App. 306, 326 S.E.2d 94 (1985); *State v. Castleberry*, 73 N.C. App. 420, 326 S.E.2d 312 (1985); *State v. Wilson*, 73 N.C. App. 398, 326 S.E.2d 360 (1985); *State v. Williams*, 73 N.C. App. 398, 326 S.E.2d 379 (1985); *State v. Smith*, 73 N.C. App. 637, 327 S.E.2d 44 (1985); *State v. Jones*, 73 N.C. App. 578, 327 S.E.2d 54 (1985); *State v. Highsmith*, 74 N.C. App. 96, 327 S.E.2d 628 (1985); *State v. Ruiz*, 72 N.C. App. 425, 335 S.E.2d 32 (1985); *State v. Riggs*, 79 N.C. App. 398, 339 S.E.2d 676 (1986).

Quoted in *State v. Corley*, 75 N.C. App. 245, 330 S.E.2d 819 (1985); *State v. Hensley*, 77 N.C. App. 192, 334 S.E.2d 783 (1985).

Stated in *State v. Thompson*, 64 N.C. App. 354, 307 S.E.2d 397 (1983); *State v. Turner*, 66 N.C. App. 203, 311 S.E.2d 331 (1984); *State v. Williams*, 67 N.C. App. 295, 313 S.E.2d 170 (1984); *State v. Harris*, 67 N.C. App. 725, 313 S.E.2d 915 (1984); *State v. Taylor*, 311 N.C. 380, 317 S.E.2d 369 (1984).

Cited in *State v. Thompson*, 60 N.C. App. 679, 300 S.E.2d 29 (1983); *State v. Abree*, 308 N.C. 379, 302 S.E.2d 230 (1983); *State v. Griffin*, 308 N.C. 303, 302 S.E.2d 447 (1983); *State v. Massey*, 62 N.C. App. 66, 302 S.E.2d 262 (1983); *State v. Mitchell*, 62 N.C. App. 21, 302 S.E.2d 265 (1983); *State v. Foster*, 63 N.C. App. 507, 305 S.E.2d 219 (1983); *State v. Lipscomb*, 65 N.C. App. 161, 308 S.E.2d 654 (1983); *Broughton v. North Carolina*, 717 F.2d 147 (4th Cir. 1983); *State v. Byrd*, 67 N.C. App. 168, 312 S.E.2d 528 (1984); *State v. Jones*, 68 N.C. App. 514, 315 S.E.2d 491 (1984);

State v. Williamson, 72 N.C. App. 657, 326 S.E.2d 37 (1985); State v. Cogdell, 74 N.C. App. 647, 329 S.E.2d 675 (1985); State v. Harrington, 78 N.C. App. 39, 336 S.E.2d 852 (1985); Hicks v. Reese, 624 F. Supp. 1116 (W.D.N.C. 1986); State v. Ransom, 80 N.C. App. 711, 343 S.E.2d 232 (1986); State v. Mack, 81 N.C. 578, 345 S.E.2d 223 (1986); State v. Hurst, 82 N.C. App. 1, 346 S.E.2d 8 (1986); State v. Stokes, — N.C. —, 352 S.E.2d 653 (1987); State v. Quesinberry, — N.C. —, 354 S.E.2d 446 (1987).

II. AGGRAVATING FACTORS.

A. In General.

Every aggravating factor must be reasonably related to the purposes of sentencing. State v. Gaynor, 61 N.C. App. 128, 300 S.E.2d 260 (1983).

This section, by its terms, prohibits the use of the same item of evidence to prove more than one factor in aggravation. State v. McLean, 74 N.C. App. 224, 328 S.E.2d 451 (1985), appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

It was error for the trial court to consider the same evidence of defendant's mental problems to support more than one aggravating factor. State v. Jones, 66 N.C. App. 274, 311 S.E.2d 351 (1984).

But Same Factor May Aggravate More Than One Conviction. — The same factor may be used to aggravate more than one conviction. State v. McCullers, 77 N.C. App. 433, 335 S.E.2d 348 (1985).

An aggravating factor can properly be found only if the defendant has exhibited some behavior which serves to increase the offender's culpability. State v. Bates, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

The existence of aggravating factors must be proved by a preponderance of the evidence. State v. Thompson, 314 N.C. 618, 336 S.E.2d 78 (1985); State v. Thompson, 318 N.C. 395, 348 S.E.2d 798 (1986).

Burden of Proof. — The State bears the burden of persuasion on aggravating factors. State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985).

The State bears the burden of proof to establish the existence of aggravating factors if it seeks a term of imprisonment greater than the presumptive sentence. State v. Thompson, 314 N.C. 618, 336 S.E.2d 78 (1985); State v. Thomp-

son, 318 N.C. 395, 348 S.E.2d 798 (1986).

Prior Conviction and Commission of Offense While Sentence Suspended Are Distinct Factors. — Defendant's prior conviction for an offense punishable by more than 60 days and the fact that, at the very time he committed the offense for which he was being tried, he was under a suspended sentence for the prior felony conviction are two clearly distinct aggravating factors. State v. Stinson, 65 N.C. App. 570, 309 S.E.2d 528 (1983), rev'd in part, 310 N.C. 737, 314 S.E.2d 546 (1984).

B. Inducing, Leading or Dominating.

The focus of subdivision (a)(1)a is on the role of defendant in inducing others to participate in the commission of an offense or in leading or dominating other participants during the commission of an offense. State v. Sanmiguel, 74 N.C. App. 276, 328 S.E.2d 326 (1985).

And Not on the Role of the Participants. — The focus of subdivision (a)(1)a of this section is not on the role of the participants in the crime, but on the role of the defendant in inducing others to participate or in assuming a position of leadership. State v. Lattimore, 310 N.C. 295, 311 S.E.2d 876 (1984).

The conduct referred to in subdivision (a)(1)a is of two types — first, inducing others, and second, leading or dominating others. The words used are not generally synonymous. Since subdivision (a)(1)a is stated in the disjunctive, proof of either type of conduct, by the preponderance of the evidence, is sufficient to support the finding of an aggravating factor. State v. Sanmiguel, 74 N.C. App. 276, 328 S.E.2d 326 (1985).

When Inducing Others and Leading Others May Constitute Two Aggravating Factors. — Inducing others to commit an offense and leading others during the commission of an offense constitute conduct which increases a defendant's culpability. Since proof of either type of conduct, by the preponderance of the evidence, is sufficient to support the finding of an aggravating factor, proof of both types of conduct should suffice to support the finding of two aggravating factors so as to reflect the defendant's greater culpability. However, since the same evidence may not be used to prove more than one aggravating factor, two aggravating factors may be found only if there is separate evidence supporting

each. *State v. Sanmiguel*, 74 N.C. App. 276, 328 S.E.2d 326 (1985).

If evidence is presented showing that a defendant induced another or others to participate in the commission of an offense, and separate evidence is presented showing that the defendant also led or dominated another or others during the commission of the offense, the court may find two separate aggravating factors. *State v. Sanmiguel*, 74 N.C. App. 276, 328 S.E.2d 326 (1985).

The aggravating factors set forth in subdivision (a)(1)a cannot be proven by conjecture. *State v. Sanmiguel*, 74 N.C. App. 276, 328 S.E.2d 326 (1985).

Inducing Conspiracy. — A preponderance of the evidence showed that defendants brought about or caused others' involvement in conspiracy and drug sale and thus supported this finding as a factor in aggravation. Defendants' contention that evidence necessary to prove the aggravating factor of inducing another to participate in the commission of the offense was also necessary to prove an essential element of the conspiracy offense was without merit, as an inducement to enter an agreement necessarily precedes the agreement itself, and only the agreement itself is an element of the offense of conspiracy. *State v. Sanmiguel*, 74 N.C. App. 276, 328 S.E.2d 326 (1985), holding, however, that a finding of the factor of leadership or dominance was in error.

Finding Upheld. — Aggravating factor found by the trial court, that defendant occupied a position of leadership or dominance over the other participants in the commission of the offense and that defendant induced others to commit the crime, was supported by the evidence. *State v. Miller*, 315 N.C. 773, 340 S.E.2d 290 (1986).

C. Hire or Pay.

The 1983 amendment to paragraph (a)(1)c evinced the legislature's intent to avoid enhancement of a sentence simply because money or other valuable items were involved in the crime charged. *State v. Thompson*, 62 N.C. App. 585, 303 S.E.2d 85 (1983).

Involvement of Money or Valuable Items Not Sufficient. — The language "The defendant was hired or paid to commit the offense" in subdivision (a)(1)c of this section, clearly evinces the legislature's intent to avoid the enhancement of a defendant's sentence

simply because money or other valuable items were involved in the crime charged. *State v. Thompson*, 62 N.C. App. 585, 303 S.E.2d 85 (1983).

Evidence Must Show That Defendant Was Paid or Hired. — Under the Fair Sentencing Act there must be evidence that the defendant was paid or hired to commit the offense before the aggravating factor of pecuniary gain may be found. *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985).

Pecuniary Gain Inherent in Offense Should Not Be Considered. — If the pecuniary gain at issue in a case is inherent in the offense, then that "pecuniary gain" should not be considered an aggravating factor. However, pecuniary incentive is not always inherent in a crime. Thus, the determination of whether pecuniary gain, as an aggravating factor, is also an element of the underlying offense is a factual one. *State v. Morris*, 59 N.C. App. 157, 296 S.E.2d 309, cert. denied and appeal dismissed, 307 N.C. 471, 299 S.E.2d 227 (1983), decided prior to the 1983 amendment to paragraph (a)(1)c.

Pecuniary Gain — Armed Robbery. — Pecuniary gain is not an essential element of the crime of armed robbery. *State v. Abdullah*, 309 N.C. 63, 306 S.E.2d 100 (1983), decided prior to the 1983 amendment to paragraph (a)(1)c.

Same — Felonious Uttering. — It is error for a trial court to consider pecuniary gain as a factor in aggravation of a sentence for uttering a fraudulent instrument, unless defendant is hired or paid for the offense, since pecuniary gain is inherent in the offense of felonious uttering. *State v. Thompson*, 62 N.C. App. 585, 303 S.E.2d 85 (1983).

D. Victim Performing or Having Exercised Official Duties.

Victim Who Was Witness against Defendant. — Evidence that defendant's shooting of his wife occurred in close proximity to defendant's conviction in a trial in which his wife had been the sole witness against him; that in the setting of that trial he made veiled references to "doing something" to his wife; and that while he had threatened and harassed her on numerous prior occasions, he made a life-threatening assault upon her only in the immediate wake of that trial, permitted the court to find as an aggravating factor, by a preponderance of the evidence, that the offense

was committed against a witness against defendant while engaged in the performance of her official duties or because of the exercise of her official duties. *State v. Laney*, 74 N.C. App. 579, 328 S.E.2d 586 (1985).

E. Heinous, Atrocious or Cruel.

Focus Is on Brutality, Pain, Suffering or Dehumanizing Aspects. — In determining whether an offense is especially heinous, atrocious or cruel, the focus should be on whether the facts of the case disclose excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in that offense. *State v. Blalock*, 77 N.C. App. 201, 334 S.E.2d 441 (1985); *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985); *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986); *State v. Newton*, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

Facts Should Be Compared with Those Attributable to Like Offenses. — Whether an offense is especially heinous, atrocious or cruel depends upon a comparison of the facts of the case with those normally attributable to other like offenses. *State v. Newton*, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

Factor May Be Found Where Serious Injury Is Element. — If the evidence establishes that the infliction of serious injury was done in an especially heinous, atrocious or cruel manner, subdivision (a)(1) does not prohibit the finding of the aggravating factor merely because infliction of a serious injury is an element of the offense. *State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986).

Multiple Acts of Same Offense. — Where proof of one act constituting an offense is sufficient to sustain a defendant's conviction, multiple acts of the same offense are relevant to the question of sentencing, including whether the offense charged was especially heinous, atrocious or cruel. *State v. Blalock*, 77 N.C. App. 201, 334 S.E.2d 441 (1985).

Multiple Injuries. — Relevant to the question of sentencing and properly considered under subdivision (a)(1) of this section is the impact of the crime on the victim. Where the physical or emotional injury is in excess of that normally present in the offense, multiple injuries would be an important consideration either as an additional factor in aggrava-

tion or as proof that the offense was especially heinous, atrocious or cruel. *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983); *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985); *State v. Cofield*, 77 N.C. App. 699, 336 S.E.2d 439 (1985).

Whether death resulted from multiple acts of violence and was immediate are factors properly considered in determining whether a murder is especially heinous, atrocious or cruel. *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985).

Time between Acts of Violence and Death. — A factor bearing on physical and psychological suffering is the length of time between a defendant's acts of violence and the victim's death. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985).

Parent-Child Relationship. — The especially heinous, atrocious or cruel factor cannot be based on a parent-child relationship when, as for example in incest, the relationship is an element of the offense. *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Consideration of Conduct in Joitable Offense as Aggravating Factor. — Where in sentencing defendant for first-degree burglary the trial judge found as a statutory aggravating factor that the offense was especially atrocious or cruel, and in so doing the trial court improperly considered evidence of defendant's course of conduct in the commission of a joitable offense, to wit: First degree murder, the case would be remanded for resentencing on defendant's first-degree burglary conviction. *State v. Flowers*, — N.C. App. —, 354 S.E.2d 240 (1987).

Evidence of Handcuffing in Murder Case. — In case in which defendant was convicted of several offenses, including kidnapping and second-degree murder, the fact that the victim's hands were handcuffed behind her back was not necessary to prove any element of the second-degree murder. Therefore, even if defendant's contention that the handcuffing was necessary to prove an element of the first-degree kidnapping was correct, there would still be no error in court's using the handcuffing in aggravation of the murder conviction. *State v. Wright*, — N.C. —, 353 S.E.2d 214 (1987).

Sufficient Evidence to Support Factor. — Evidence that defendant fired two shots from close range into vic-

tim's groin, leaving four wounds or holes in his scrotum and then walked over to victim, who was lying on the living room floor, stood over him for a few seconds, and fired a third and fatal bullet into his head, supported the trial court's finding that the offense was especially heinous, atrocious, or cruel. *State v. Jones*, 83 N.C. App. 593, 351 S.E.2d 122 (1986).

Evidence Held Sufficient — Armed Robbery of Mother by Son. — The armed robbery of a mother by her son involves those emotions which the parent-child relationship evokes and thus produces psychological suffering and victim dehumanization beyond that normally present in armed robbery offenses. Thus the finding that such an armed robbery offense was especially heinous, atrocious or cruel was proper. *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Evidence Held Sufficient — Assault with Deadly Weapon. — Since only a single blow was necessary to prove an element of the offense of assault with a deadly weapon, and the evidence established the infliction of multiple blows with a hatchet, the court could properly find as to the assault offense that the offense was especially heinous, atrocious or cruel. *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

The trial court's finding that the offense was heinous, atrocious or cruel was adequately supported by evidence that an initial shot resulted in a wound to victim's heart which was sufficient to support a conviction of assault with a deadly weapon with intent to kill inflicting serious injury and that second, third, and fourth shots resulted in a severed jugular vein and permanent nerve injury to victim's arm. Moreover, the record disclosed ample evidence of physical pain and psychological suffering sufficient to support the finding that the offense was heinous, atrocious or cruel, where the victim pled with the defendant to stop firing, and after all four shots were fired, the victim was on the ground, drifting in and out of consciousness, and felt pain and trauma, yet was unable to get help because she could not move. *State v. Vaught*, 318 N.C. 480, 349 S.E.2d 583 (1986).

Evidence Not Sufficient — Assault with Deadly Weapon. — It was error for the trial court to find as a factor in aggravation that assault with a deadly weapon resulting in serious injury was especially heinous, atrocious or cruel,

where the victim received 50 stitches, was hospitalized for two weeks, lost the sight in one eye and had some amnesia, as it could not be said that the conduct of defendant was any more brutal than that inherent in any assault with a deadly weapon resulting in serious bodily injury. *State v. McLean*, 74 N.C. App. 224, 328 S.E.2d 451 (1985), appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

In a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury, defendant's acts of repeatedly striking his wife in the presence of their daughter, telling her to kiss him goodbye, and refusing to get help after she was injured did not represent brutality beyond that found in other assaults with a deadly weapon with the intent to kill inflicting serious injury, and were insufficient to sustain a finding of the aggravating factor. *State v. Newton*, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

Evidence Held Sufficient — Second Degree Murder. — Evidence held to show both psychological and physical suffering beyond that normally present in the offense of second degree murder, so as to justify finding that the offense was especially heinous, atrocious or cruel. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985).

The trial court erred in finding as a factor in aggravation that offense of second-degree murder was especially cruel, where the evidence in the case was that the unsuspecting victim was shot one time in the back. This shooting was no crueler than any other fatal shooting; indeed, since the victim did not know he was going to be shot it might have been less cruel than the usual face-to-face shooting. *State v. Nelson*, 76 N.C. App. 371, 333 S.E.2d 499, supersedeas granted, 314 N.C. 670, 337 S.E.2d 583 (1985), modified on other grounds and aff'd, 316 N.C. 350, 341 S.E.2d 561 (1986).

F. Risk of Death to More Than One Person.

What Weapons Are Contemplated by This Factor. — The legislature intended this aggravating factor to be limited to those weapons or devices which are indiscriminate in their hazardous power. Automatic weapons such as machine guns or bombs would fit that description. These weapons are normally

hazardous to the lives of more than one person. A rifle, while it may sometimes be dangerous to the lives of more than one person, is not so normally. *State v. Bethea*, 71 N.C. App. 125, 321 S.E.2d 520 (1984); *State v. Jones*, 83 N.C. App. 593, 351 S.E.2d 122 (1986).

A machine gun is one weapon contemplated by the aggravating factor that defendant employed a weapon normally hazardous to the lives of more than one person. *State v. Platt*, — N.C. App. —, 354 S.E.2d 332 (1987).

Rifle. — It was error to find as an aggravating factor that the defendant employed a weapon normally hazardous to the lives of more than one person, where defendant employed a .30-.30 lever action rifle. *State v. Bethea*, 71 N.C. App. 125, 321 S.E.2d 520 (1984).

A .38 caliber handgun is not normally dangerous to the lives of more than one person, and thus the trial court erred in finding this aggravating factor. *State v. Jones*, 83 N.C. App. 593, 351 S.E.2d 122 (1986).

Factor Applied in Case of Assault with Deadly Weapon. — The court did not err in using the factor that defendant employed a weapon normally hazardous to the lives of more than one person to aggravate sentences for assault with a deadly weapon with intent to kill inflicting serious injury. *State v. Platt*, — N.C. App. —, 354 S.E.2d 332 (1987).

G. Deadly Weapon.

Factor Precluded Where Inference of Malice Arises from Use of Deadly Weapon. — When the facts justify an instruction on the inference of malice arising as a matter of law from the use of a deadly weapon, evidence of the use of that deadly weapon may not be used as an aggravating factor at sentencing. This "bright-line" rule avoids hair-splitting factual disputes necessitated by having to second guess jury decisions as to the existence of malice. *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983).

Where malice can be inferred from a murder perpetrated by the use of a deadly weapon, irrespective of whether defendant is convicted of or pleads to the charge, use of the deadly weapon will be deemed evidence necessary to prove the element of malice. *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983).

A per se rule exists in this State that when the facts justify an inference of malice arising from the use of a deadly

weapon, evidence concerning the use of that deadly weapon may not be used to support an aggravating factor at sentencing. Even where defendant pleads guilty, use of the deadly weapon is deemed to be evidence necessary to prove the element of malice. *State v. Taylor*, 309 N.C. 570, 308 S.E.2d 302 (1983).

When the facts justify an inference of malice arising only from the use of a deadly weapon, evidence concerning the use of that deadly weapon may not be used to support an aggravating factor at sentencing. This rule is applicable to both convictions or pleas in first or second-degree murder cases where malice is an essential element. *State v. Lattimore*, 310 N.C. 295, 311 S.E.2d 876 (1984).

Existence of Deadly Weapon Used to Support More Than One Factor. — In a prosecution for two murders, use of the existence of a deadly weapon in finding both the aggravating circumstance that the defendant was armed with a deadly weapon and the aggravating circumstance that each murder was committed during a course of conduct in which defendant engaged in an act of violence against another person was proper, since although the deadly weapon was common to both factors, evidence tending to prove each factor was necessarily different. *State v. Taylor*, 309 N.C. 570, 308 S.E.2d 302 (1983).

Where assault with a deadly weapon was a joined offense of which defendant was contemporaneously convicted, to aggravate armed robbery offense based on evidence of the assault would be improper. *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Unlawful Killing Generally. — The General Assembly did not intend that the use of a deadly weapon at the time of a crime be used to enhance sentences in cases where the offense itself is an unlawful killing accomplished by shooting the victim with a deadly weapon. *State v. Green*, 62 N.C. App. 1, 301 S.E.2d 920, modified on other grounds and aff'd, 309 N.C. 623, 308 S.E.2d 326 (1983).

Murder. — Court erred in finding as a statutory aggravating factor that defendant, who pleaded guilty to second degree murder, used a deadly weapon at the time of the crime. *State v. Coleman*, 80 N.C. App. 271, 341 S.E.2d 750 (1986).

Manslaughter. — Standing alone, use of a deadly weapon to shoot a victim and thereby accomplish an unlawful

killing may not be considered as a factor in aggravation in manslaughter cases. But if the deadly weapon was used in a manner which rendered the offense especially heinous, atrocious or cruel, that may properly be considered as a factor in aggravation. *State v. Green*, 62 N.C. App. 1, 301 S.E.2d 920, modified on other grounds and aff'd, 309 N.C. 623, 308 S.E.2d 326 (1983).

Where it appeared that the court erred in finding, in sentencing the defendant for voluntary manslaughter, as an aggravating factor, that the defendant killed her husband with a deadly weapon, the case was remanded for resentencing. *State v. Heidmous*, 75 N.C. App. 488, 331 S.E.2d 200 (1985).

Where, for the jury to convict the defendant of involuntary manslaughter under the instruction given by the trial court, it necessarily had to find that the defendant was armed with and discharged a firearm, the possession and discharge of the firearm in effect became an element of the offense, and the same evidence could not be considered as a factor aggravating the manslaughter for sentencing. *State v. Evangelista*, — N.C. —, 353 S.E.2d 375 (1987).

Assault with Deadly Weapon with Intent to Kill. — The trial court, in sentencing, cannot rely upon the aggravating factor of the defendant's use of a deadly weapon when the defendant is convicted of assault under § 14-32. *State v. Braswell*, 67 N.C. App. 609, 313 S.E.2d 216 (1984).

Rape. — Where a defendant has been charged with rape in the first degree under § 14-27.2(a)(1) but has pled guilty to rape in the second degree under § 14-27.3(a)(2), if the sentencing judge concludes by a preponderance of the evidence that the defendant used a gun during the rape, this would be a factor that must be considered in deciding whether to sentence the defendant beyond the presumptive term for the admitted offense. *State v. Melton*, 30 N.C. 370, 298 S.E.2d 637 (1983).

Armed Robbery. — Possession or use of a firearm should not be used as an aggravating factor to lengthen the sentence in a robbery with firearm case. *State v. Morris*, 59 N.C. App. 157, 296 S.E.2d 309, cert. denied and appeal dismissed, 307 N.C. 471, 299 S.E.2d 227 (1983).

One essential element necessary to prove the offense of armed robbery is that of the possession, use or threatened

use of a firearm or other dangerous weapon. Thus, the use of this factor is proscribed under this section. *State v. Abdullah*, 309 N.C. 63, 306 S.E.2d 100 (1983).

Burglary. — In a prosecution for first degree burglary, where the defendant broke into and entered a motel room by pointing a gun at the victim's head and driving him into the room, wherein he committed armed robbery, the trial court erred in sentencing him by considering as a factor in aggravation the use of a deadly weapon. If the evidence of the deadly weapon was removed, the State would have failed to prove three elements of the burglary: breaking, entering and intent to commit a felony. *State v. Edwards*, 75 N.C. App. 588, 331 S.E.2d 183 (1985).

Larceny. — It was not improper for the court to find the use of a deadly weapon at the time of the crime as a factor in aggravation of larceny offense, even though evidence of its use was necessary to prove an essential element of the joinable offense of second-degree murder. *State v. Coleman*, 80 N.C. App. 271, 341 S.E.2d 750, cert. denied, 318 N.C. 285, 347 S.E.2d 466 (1986).

H. Young, Old or Infirm Victim.

The underlying policy of paragraph (a)(1)j of this section is to discourage wrongdoers from taking advantage of a victim because of the victim's young or old age or infirmity. *State v. Eason*, 67 N.C. App. 460, 313 S.E.2d 221, affirmed, 312 N.C. 320, 321 S.E.2d 881 (1984).

When Age or Infirmary of Victim May Be Used as Aggravating Factor.

— The age of the victim may not be used as an aggravating factor unless it appears that the defendant took advantage of the victim's relative helplessness to commit the crime or that the harm was worse because of the age or condition of the victim. *State v. Monk*, 63 N.C. App. 512, 305 S.E.2d 755 (1983).

Although subdivision (a)(1)j provides that extreme youth, old age or physical infirmity may be found to be an aggravating factor, this factor should not be found unless it appears that defendant took advantage of the victim's relative helplessness to commit the crime or that age or infirmity increased the resultant harm. *State v. Newton*, 82 N.C. App. 555, 347 S.E.2d 81 (1986), cert. denied, 318 N.C. 699, 351 S.E.2d 756 (1987).

Defendant's Culpability Must Be

Enhanced by Victim's Age or Condition. — Age of the victim is not reasonably related to the purposes of sentencing, as required by subsection (a) of this section, unless culpability is enhanced by defendant's having taken advantage of the victim's relative defenselessness occasioned by age. *State v. Eason*, 67 N.C. App. 460, 313 S.E.2d 221, affirmed, 312 N.C. 320, 321 S.E.2d 881 (1984).

A victim's age or condition is reasonably related to the purposes of sentencing only when it enhances the defendant's culpability. *State v. Williams*, 74 N.C. App. 574, 328 S.E.2d 775 (1985).

Age should not be considered as an aggravating factor in sentencing unless it makes the defendant more blameworthy than he or she already is as a result of committing a violent crime against another person. *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985).

Vulnerability is clearly the concern addressed by paragraph (a)(1)j of this section. *State v. Eason*, 67 N.C. App. 460, 313 S.E.2d 221, affirmed, 312 N.C. 320, 321 S.E.2d 881 (1984); *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985).

The vulnerability of the victim due to age and mental or physical infirmity is the concern addressed by the aggravating factor established by subdivision (a)(1)j of this section. *State v. Long*, 316 N.C. 60, 340 S.E.2d 392 (1986).

Age or Infirmity Must Make Victim More Vulnerable. — A victim's age does not make a defendant more blameworthy unless the victim's age causes him to be more vulnerable than he otherwise would be to the crime committed against him, as where age impedes a victim from fleeing, fending off attack, recovering from its effects, or otherwise avoiding being victimized. Unless age has such an effect, it is not an aggravating factor under the Fair Sentencing Act. *State v. Hines*, 314 N.C. 522, 335 S.E.2d 6 (1985).

As Where Defendant's Decision to Commit Crime Is Based on Victim's Age. — Where a defendant decides to perpetrate a crime against an individual, based in part on the likelihood that the crime will be successfully completed because of the intended victim's advanced age, the victim's age has made him more vulnerable than otherwise would be the case, and the trial court may properly find this aggravating factor. *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986).

But Victim Need Not Be Targeted Because of Age or Infirmity. — For purposes of the aggravating factor of the victim's infirmity, it is not necessary that the victim be targeted because of her infirmity, but only that this condition be taken advantage of by the defendant. *State v. Thompson*, 318 N.C. 395, 348 S.E.2d 798 (1986).

How Defendant May Take Advantage of Age or Infirmity of Victim. — For purposes of the aggravating factor of age of the victim, there are at least two ways in which a defendant may take advantage of the age of his victim. First, he may "target" the victim because of the victim's age, knowing that his chances of success are greater where the victim is very young or very old. Secondly, the defendant may take advantage of the victim's age during the actual commission of a crime against the person of the victim, or in the victim's presence, knowing that the victim, by reason of age, is unlikely to effectively intervene or defend himself. *State v. Thompson*, 318 N.C. 395, 348 S.E.2d 798 (1986).

Age of Victim of First-Degree Rape Not to Be Considered. — Due to the General Assembly giving children under 13 greater protection from first-degree rape than victims over 13, the rape of a victim under 13 by a defendant at least 12 and at least four years older than the victim makes the defendant more blameworthy, because rape victims under 13 are in fact more vulnerable to the crime of rape than they would otherwise be if older than 12. This does not, however, allow the age of the victim to be considered in sentencing for first-degree rape, because (1) age is an element of first-degree rape under § 14-27.2(a)(1) and as such cannot be considered an aggravating factor upon sentencing for that crime under subsection (a)(1)p, and (2) first-degree rape is a Class B felony which carries a mandatory life sentence without consideration of aggravating and mitigating factors, under § 14-1.1(a)(2). *State v. Vanstory*, — N.C. App. —, 353 S.E.2d 236 (1987).

Age of Victim of Second-Degree Rape May Be Considered. — Because age of the victim is not a necessary element of second-degree rape, and a determination by a preponderance of the evidence in the sentencing phase that the defendant raped a child 11 years old is reasonably related to the purpose of sentencing, the age of a victim under 13

may be considered as a nonstatutory aggravating factor in sentencing for second-degree rape. *State v. Vanstory*, — N.C. App. —, 353 S.E.2d 236 (1987).

Age of Child in Case Involving Indecent Sexual Liberties May Be Considered. — Finding that eight-year old victim was "very young" was not clearly erroneous in the context of case which dealt with the vulnerability of a child to indecent sexual liberties. The element of age in the offense spans 16 years. Proof that the victim was "very young" was not necessary to prove the offense, and consequently the aggravating factor and the offense did not merge. *United States v. Price*, 812 F.2d 174 (4th Cir. 1987).

Finding Upheld. — Where the evidence showed that defendant choked 81 year old victim to unconsciousness before raping her and stealing two heaters, it was appropriate for the judge to conclude that the victim's age had made her more vulnerable than most women to the defendant's forcible and felonious invasion of her home and was therefore related to the purposes of sentencing. *State v. Williams*, 74 N.C. App. 574, 328 S.E.2d 775 (1985).

Although the State relied on evidence showing that second-degree murder victim suffered from "battered child syndrome" in order to obtain a conviction (i.e., the age of the victim and the caretaker role of the defendant), the court did not err in sentencing by finding as aggravating circumstances that the victim was very young and that the defendant took advantage of a position of trust or confidence, as these factors were not elements of the offense. *State v. Hitchcock*, 75 N.C. App. 65, 330 S.E.2d 237, cert. denied, 314 N.C. 334, 333 S.E.2d 493 (1985).

Where, at the time of the offense, victim was wearing a leg cast and, as a result, after being shot, she had difficulty getting up, only managing to get back to her bedroom to call for assistance two hours later, there was little doubt that the victim's physical infirmity impeded her ability to recover from the effects of the attack and to call for assistance, and thus, the trial court did not err in finding the victim's physical infirmity as an aggravating factor in offense of assault with a deadly weapon with intent to kill. *State v. Vaught*, 318 N.C. 480, 349 S.E.2d 583 (1986).

Finding Held Error. — The trial court erred in finding as an aggravating factor, in sentencing defendant for rob-

bery with a dangerous weapon and assault with a deadly weapon with intent to kill inflicting serious injury that the victim was very young when the victim was 17 years old at the time of the crimes. *State v. Cogdell*, 74 N.C. App. 647, 329 S.E.2d 675 (1985).

Where the defendant simply entered and stole from an unoccupied house, the victim's age had nothing to do with it and the trial court erred in finding the victim's age as an aggravating factor. *State v. Fair*, 77 N.C. App. 641, 335 S.E.2d 783 (1985), cert. denied, 316 N.C. 381, 342 S.E.2d 900 (1986).

Aggravation of defendant's sentence for taking indecent liberties with a minor on the ground that the 13 year old victim was very young was error, as she was not, for purposes of this offense, "very young." *State v. Sumpter*, 318 N.C. 102, 347 S.E.2d 396 (1986).

It was error for the trial judge to aggravate sentence for felonious assault with the factor that the 11 and 14 year old victims were very young, as the victims were not at the beginning of the age spectrum and the State failed to show that they were rendered more vulnerable to defendant's assault than the average person would have been by reason of their age. *State v. Long*, 316 N.C. 60, 340 S.E.2d 392 (1986).

I. Commission of Crime While on Pretrial Release.

Constitutionality of Considering Defendant's Status as Pretrial Releasee. — Whether or not one on pretrial release on another felony charge is in fact guilty, it is to be expected that he would, while the question of his guilt is pending, be particularly cautious to avoid commission of another criminal offense. If he is not and is convicted of another offense, his status as a pretrial releasee in a pending case is a legitimate circumstance to be considered in imposing sentence. The legislature may constitutionally require that it be considered. *State v. Webb*, 309 N.C. 549, 308 S.E.2d 252 (1983).

It is not error for the court to consider as an aggravating factor that the defendant had committed the offenses with which he was charged while on pretrial release on another felony charge. Such consideration does not violate his constitutional rights. *State v. Herring*, 74 N.C. App. 269, 328 S.E.2d 23 (1985), aff'd, 318 N.C. 188, 340 S.E.2d 105 (1986).

J. Great Monetary Value or Loss.

Monetary Loss Must Be Loss from Property Damage. — The aggravating factor under paragraph (a)(1)m of this section applies only to damage to property causing great monetary loss, and not to great monetary loss incurred because of a personal injury. *State v. Sowell*, 318 N.C. 460, 350 S.E.2d 363 (1986).

Consideration of the financial burden imposed upon the victim by his or her injury is not statutorily mandated by aggravating factor (a)(1)m under this section. *State v. Bryant*, 318 N.C. 632, 350 S.E.2d 358 (1986).

Property Taken or Attempted to Be Taken Is Contemplated. — The aggravating factor of the taking of property of great monetary value speaks of the value of the property taken or attempted to be taken, and not the value of the property which is ultimately retained or possessed by a particular defendant. *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986).

The gist of subdivision (a)(1)m is the value of the property and not whether there was a taking or attempted taking of property. The aspect of the designated aggravating factor which permits enhancing the punishment is the great value of the personal property in possession of the defendant. *State v. Aldridge*, 76 N.C. App. 638, 334 S.E.2d 107 (1985), upholding judge's finding as an aggravating factor in sentencing defendant for possession of stolen goods and being a habitual felon that the offense involved an attempted taking of property of great monetary value.

Taking of Money or Property in Armed Robbery. — Since the offense of robbery with firearms does not require proof that money was actually taken, the taking of a large sum of money is properly considered as an aggravating factor. *State v. Thompson*, 64 N.C. App. 485, 307 S.E.2d 838 (1983), cert. denied, 313 N.C. 513, 329 S.E.2d 399 (1985).

Since the crime of armed robbery does not require proof that property was actually taken, the mere attempt to take property by use of a firearm or other deadly weapon being sufficient, this aggravating factor may be properly found in armed robbery cases. Thus, where the evidence tended to show that defendant, acting alone or in concert, took \$3,200.00 from victim during armed robbery, the court could properly find as an

aggravating factor the taking of "property of great monetary value." *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986).

Great Monetary Value of Subject of Larceny. — Trial court did not err in finding as a factor in aggravation that offense of felonious larceny involved the taking of property of great monetary value, where evidence tended to show that the value of the taxi cab taken was approximately \$3,000.00. *State v. Coleman*, 80 N.C. App. 271, 341 S.E.2d 750, cert. denied, 318 N.C. 285, 347 S.E.2d 466 (1986).

K. Position of Trust.

Factor Not to Be Considered Where It Is an Element of the Charged Offense. — A relationship of trust and confidence was needed to prove the custodial element of custodial sexual offense. The evidence that proved the aggravating factor that the defendant took advantage of a position of trust or confidence to commit the offense thus was necessary to prove the custodial element of the offense, and the finding of the aggravating factor was proscribed by subsection (a). *State v. Raines*, — N.C. —, 354 S.E.2d 486 (1987).

Factor Dependant Neither Upon Victim's Age Nor Consciousness of Victim's Trust. — A finding of the aggravating factor that the defendant took advantage of a position of trust or confidence depends no more on the youth of the victim than it does on the notion that confidence or trust in the defendant must repose consciously in the victim. Such a finding depends instead upon the existence of a relationship between the defendant and victim generally conducive to reliance of one upon the other. *State v. Daniel*, — N.C. —, 354 S.E.2d 216 (1987).

Relationship of Mother to Infant. — A relationship of trust or confidence existed between defendant and her newborn infant, whom she killed, because defendant was the child's mother and because she was singularly responsible for its welfare. The abuse of her parental role related to defendant's character and conduct and was reasonably related to the purposes of sentencing. *State v. Daniel*, — N.C. —, 354 S.E.2d 216 (1987).

Nature of Trust Between Defendant and Family Members. — The aggravating sentencing factor under subsection (a)(1)n does not require the de-

fendant to abuse a position of greater "trust and confidence" than that inherent among family members whenever defendant is convicted of taking indecent liberties with such family members. *State v. Caldwell*, — N.C. App. —, 355 S.E.2d 813 (1987).

Duty of Drivers to Passengers. — Finding in aggravation that defendant violated a position of trust is not supported merely by the long history of special duties owed by drivers to passengers in their cars. *State v. Carroll*, — N.C. App. —, 355 S.E.2d 844 (1987).

Where defendant was convicted of taking indecent liberties with his stepson and stepson's overnight guest, court properly found as an aggravating factor that he abused a position of trust and confidence to commit the offense. *State v. Caldwell*, — N.C. App. —, 355 S.E.2d 813 (1987).

Conviction under § 14-27.7. — Trial court erred in sentencing defendant, convicted of two violations of § 14-27.7, by finding as an aggravating factor that the defendant "took advantage of a position of trust or confidence to commit the offense," as evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the evidence necessary to convict defendant tended to show that he took advantage of his custodial position in committing the offenses involved. *State v. Raines*, 81 N.C. App. 299, 344 S.E.2d 138, cert. granted, 317 N.C. 712, 347 S.E.2d 450 (1986).

Insufficient Evidence to Support Finding of Factor. — Where defendant and victim had met only a day and a half before victim was found fatally wounded and the evidence showed only that the two men talked and that victim decided to ride down to Darlington with defendant in defendant's car, there was no evidence to support the trial court's finding as a factor in aggravation that defendant took advantage of a position of trust or confidence. *State v. Carroll*, — N.C. App. —, 355 S.E.2d 844 (1987).

L. Prior Convictions.

1. In General.

"Prior Conviction" Defined. — This section contains no language to support the argument that the legislature intended to define "prior conviction" as a conviction obtained before a later offense was committed; a fair reading of the statute defines "prior conviction" as

one that is obtained before the defendant is sentenced for another offense. *State v. McCullers*, 77 N.C. App. 433, 335 S.E.2d 348 (1985).

Convictions in Which Prayer for Judgment Was Continued. — In finding prior convictions as an aggravating factor, it is improper for the court to consider convictions in cases in which prayer for judgment was continued. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

An offense is a "prior conviction" under the Fair Sentencing Act only if the judgment has been entered and the time for appeal has expired, or the conviction has been upheld on appeal. When an accused is convicted with prayer for judgment continued, no judgment is entered, and no appeal is possible (until judgment is entered). Such a conviction may not support a finding of an aggravating circumstance under subdivision (a)(1)o. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

Convictions in which prayer for judgment was continued and no fines or other conditions imposed did not constitute "prior convictions" under the Fair Sentencing Act. *State v. Southern*, 314 N.C. 110, 331 S.E.2d 688 (1985).

Prior Conviction Which Is on Appeal. — The trial court erred by finding as the sole aggravating factor that defendant had been convicted of robbery with a dangerous weapon in another case, where that case was on appeal to the Court of Appeals at the time of the sentencing hearing. *State v. Dorsett*, 81 N.C. App. 515, 344 S.E.2d 342 (1986).

Subdivision (a)(1)o does not include any time limit within which convictions must have occurred. *State v. Lane*, 77 N.C. App. 741, 336 S.E.2d 410 (1985); *State v. Moxley*, 78 N.C. App. 551, 338 S.E.2d 122 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 904 (1986).

Nor does it make any distinction among crimes of violence, property crimes and traffic offenses. *State v. Lane*, 77 N.C. App. 741, 336 S.E.2d 410 (1985).

Serving of Sentence Is Subsumed within Prior Conviction Factor. — The fact that the legislature specifically authorized the use of prior convictions as an aggravating factor is an indication that a sentence, whether suspended or served actively, is subsumed within that legislated factor. Thus, it was improper to consider both a prior conviction and the serving of a prison sentence as ag-

gravating factors. *State v. Isom*, 65 N.C. App. 223, 309 S.E.2d 283 (1983).

Weighing Severity of Prior Offense in Imposing Sentence. — The General Assembly has determined that a conviction of a criminal offense punishable by more than sixty days' confinement shall be an aggravating factor. If the court were to hold that such a factor should be of small weight in imposing a sentence if the crime for which the defendant was convicted was a minor offense, it would be substituting its judgment for the judgment of the legislature, which the court cannot do. *State v. Parker*, — N.C. —, 355 S.E.2d 489 (1987).

Defendant on Parole at Time of Present Offense as Separate Aggravating Factor. — It is not error for a trial court to find as an aggravating factor that a defendant has prior criminal convictions, and then to find as a separate aggravating factor that the defendant was on parole at the time of the present offense. *State v. McRae*, — N.C. App. —, 354 S.E.2d 30 (1987).

Use of Fact Needed to Prove Contemporaneous Conviction. — The exclusion found in subsection (a)(1)o applies only to the use of prior convictions that could have been joined with the conviction for which defendant is being sentenced. It does not apply to the use of a fact needed to prove an element of a contemporaneous conviction. *State v. Wright*, — N.C. —, 353 S.E.2d 214 (1987).

Finding of Prior Conviction as Factor Upheld. — In a prosecution for rape, evidence of defendant's prior conviction of assault with intent to commit rape, while some evidence of intent, was not necessary to prove the intent element. Accordingly, it was not error for the trial court to use evidence of defendant's prior conviction as a factor in aggravation at sentencing. *State v. Moser*, 74 N.C. App. 216, 328 S.E.2d 315 (1985).

The sentencing judge did not err in treating defendant's plea of nolo contendere to a charge of failure to provide child support as a prior conviction for a crime punishable by imprisonment for more than 60 days and an additional aggravating factor under subdivision (a)(1)o. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985).

Separate Factors Not Shown. — Fact that defendant had prior convictions for criminal offenses punishable by more than 60 days imprisonment and that he had a prior record involving the

use of violence covering a span in excess of 10 years were too similar, the latter being based upon the former, to be considered as separate factors for purposes of sentencing. *State v. McLean*, 74 N.C. App. 224, 328 S.E.2d 451 (1985), appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

Indication of Conviction Relied upon Aids Appellate Review. — It would be helpful for purposes of appellate review for trial judges to note the conviction or convictions specifically relied upon under subdivision (a)(1)o of this section, particularly where the method of proof or the issue of representation by counsel is raised at the sentencing hearing. *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983).

2. Evidence.

The means of proof set out in subsection (e) are permissive, not mandatory or exclusive. *State v. Graham*, 61 N.C. App. 271, 300 S.E.2d 716, modified on other grounds and aff'd, 309 N.C. 587, 308 S.E.2d 311 (1983); *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983); *State v. Carter*, 318 N.C. 487, 349 S.E.2d 580 (1986).

Other Methods of Proof Are Not Precluded. — The language of subsection (e) of this section is permissive rather than mandatory. It provides that prior convictions "may" be proved by stipulation or by original or certified copy of the court record, not that they must be. The statute thus does not preclude other methods of proof. *State v. Massey*, 59 N.C. App. 704, 298 S.E.2d 63 (1982); *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983); *State v. Strickland*, 318 N.C. 653, 351 S.E.2d 281 (1987); *State v. Morgan*, 82 N.C. App. 674, 347 S.E.2d 487 (1986).

Subsection (e) of this section does not preclude the State from using reliable methods of proof other than those enumerated by the statute for proving prior convictions. *State v. Teague*, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

The more appropriate way to show the "prior conviction" aggravating circumstance would be to offer authenticated court records, for such records establish a prima facie case. However, the legislature did not intend to bind the State and the trial court by precluding other means of proof. *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983).

Defendant's own statements under oath constitute an acceptable alter-

nate method of proof of a prior conviction. *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983); *State v. Graves*, 83 N.C. App. 126, 349 S.E.2d 320 (1986).

A prior conviction may be proved by a law enforcement officer's testimony as to his personal knowledge of the conviction. *State v. Carter*, 318 N.C. 487, 349 S.E.2d 580 (1986); *State v. Strickland*, 318 N.C. 653, 351 S.E.2d 281 (1987).

The prosecutor's unsworn statements as to defendant's criminal record were not competent evidence to support a finding of an aggravating factor that defendant had prior convictions. *State v. Frazier*, 80 N.C. App. 547, 342 S.E.2d 534 (1986).

Defendant has burden of proving that records of prior convictions are not in fact his. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

3. Indigency at Time of Conviction.

Indigent Defendant Must Have Been Represented by Counsel or Waived Same. — A prior conviction which occurred while the defendant was indigent cannot be used unless defendant was represented by counsel or waived counsel in the earlier proceeding. *State v. Farmer*, 60 N.C. App. 779, 299 S.E.2d 842 (1983).

Burden on Defendant to Show Indigency and Lack of Counsel. — The initial burden of raising the issue of indigency and lack of assistance of counsel on a prior conviction is on the defendant. If the defendant elects to challenge the admissibility of evidence of his prior convictions, he must do so by a method which informs the court of the specific reason for his objection; i.e. that he was indigent and unrepresented by counsel at the time of the prior conviction or convictions. A mere objection to the evidence alone will not be sufficient. *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983).

Pursuant to subsection (e) of this section, the initial burden of raising the issue of indigency and lack of assistance of counsel on a prior conviction is on the defendant. *State v. Norris*, 65 N.C. App. 336, 309 S.E.2d 507 (1983); *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

The onus is on the defendant to inform the court that he is prepared on voir dire to offer proof that he was indigent and unrepresented by counsel at the time of

the prior convictions. *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983).

Burden Not on State. — The State does not have the burden to raise and prove nonindigency and representation by counsel or waiver of counsel in order to support a finding that the defendant had a prior conviction or convictions. *State v. Callicutt*, 309 N.C. 626, 308 S.E.2d 333 (1983); *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983).

Use of Prior Conviction Not Error Where Defendant Fails to Contest Validity. — It is not error for the trial court to consider a prior conviction as an aggravating circumstance absent evidence that defendant was not indigent or was represented by counsel at the prior conviction, where defendant does not make an issue of the validity of the prior conviction in the trial court. *State v. Massey*, 309 N.C. 625, 308 S.E.2d 332 (1983).

Where the defendant did not object to the introduction of evidence of his prior convictions, nor allege that he was indigent and not represented by counsel at the time, the State's failure to show that, at the time of his prior convictions the defendant either was not indigent or was represented by or waived counsel did not render the finding of this aggravating factor by the trial court erroneous. *State v. Green*, 309 N.C. 623, 308 S.E.2d 326 (1983).

Silence at Trial Precludes Review on Appeal. — Where a defendant stands silent and, without objection or motion, allows the introduction of evidence of a prior conviction, he deprives the trial division of the opportunity to pass on the constitutional question and is properly precluded from raising the issue on appeal. *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983).

M. Nonstatutory Factors.

Failure to Perform a Mitigating Act Is Not an Aggravating Factor. — It is improper to aggravate a defendant's sentence for his failure to perform an act when the doing of the act would support the finding of a factor in mitigation. *State v. Coleman*, 80 N.C. App. 271, 341 S.E.2d 750, cert. denied, 318 N.C. 285, 347 S.E.2d 466 (1986).

Serious injury may be an aggravating factor. *State v. Nichols*, 66 N.C. App. 318, 311 S.E.2d 38, cert. denied, 311 N.C. 406, 319 S.E.2d 278 (1984).

Pregnancy of Victim. — On conviction

tion of assault with a deadly weapon inflicting serious injury, it was not error for the trial judge to find the victim's advanced stage of pregnancy as a non-statutory aggravating factor and, based thereon, to sentence the defendant to a term of years greater than the presumptive term provided for the offense. *State v. Artis*, 316 N.C. 507, 342 S.E.2d 847 (1986).

Intoxication of Victim. — Intoxication of the defendant has been recognized as a mitigating factor by the courts. It would be both unreasonable and unfair to allow defendant's intoxication to be considered a mitigating factor, but not to allow the victim's intoxication to be an aggravating factor. Clearly the legislature did not intend this result. *State v. Potts*, 65 N.C. App. 101, 308 S.E.2d 754 (1983), cert. denied, 311 N.C. 406, 319 S.E.2d 278 (1984).

Pattern of Conduct Causing Serious Danger to Society. — Where upon sentencing defendant for larceny and breaking or entering the trial court found as the only aggravating factor that the defendant engaged in a pattern of conduct causing serious danger to society, and the only basis for the trial court's finding of this aggravating factor was evidence of joinable offenses for which defendant was also being sentenced, defendant's convictions of larceny and breaking or entering would be remanded for resentencing. *State v. Flowers*, — N.C. App. —, 354 S.E.2d 240 (1987).

Victim Asleep at Time of Assault. — The trial court erred in finding as an aggravating factor at sentencing for assault with a deadly weapon inflicting serious injury that the victim was asleep at the time of the assault. *State v. Underwood*, — N.C. App. —, 352 S.E.2d 898 (1987).

Evidence Necessary to Show Elements of Charged Crime. — In sentencing defendant for being an accessory before the fact to second-degree murder, the court erred in finding as a non-statutory aggravating factor that defendant dispensed cocaine to the principals in substantial quantity while inducing them to kill and murder the two victims, promised to forgive debts to him, and furnished a knife and a pistol to the principals to use in the crime, and that the principals who were solicited and procured by the defendant committed murder in the act of robbery and without any legal provocation, as this evidence

was necessary to show that defendant participated in the planning or contemplation of the crime in such a way as to counsel, procure, or command the principals to commit it. *State v. Kimbrell*, — N.C. App. —, 351 S.E.2d 801 (1987).

Medical Expenses of Victim. — In sentencing defendant for assault with a deadly weapon inflicting serious injury, consideration of the medical expenses incurred by the victim was not prohibited by the provision of subdivision (a)(1) of this section that "Evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation, and the same item of evidence may not be used to prove more than one factor in aggravation," as although evidence of large medical and hospital expenses is both properly and frequently used to establish the element of serious injury, such expenses are not inherent in every instance of a serious injury, nor are such expenses a necessary method for proving the element of serious injury, and in the case at issue the State did not rely on such expenses to establish the element of serious injury, but instead presented evidence of the permanent disabilities suffered by the victim as a result of the assault to prove serious injury. *State v. Sowell*, 318 N.C. 640, 350 S.E.2d 363 (1986).

Failure to Aid Victim. — The trial court erred, in sentencing defendant on his plea to voluntary manslaughter, in finding as an aggravating factor defendant's failure to aid his victim, whom he left dying in a field. *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

Failure to Aid in Law Enforcement. — Fact that the defendant did not at any time render assistance to the arresting officer or the district attorney and did not offer aid in the apprehension of other felons could not be considered as aggravating factors. Because it was difficult to ascertain what help the defendant could have provided without implicating himself, consideration of these two aggravating factors was a potential infringement on his right to plead not guilty. *State v. Thobourne*, 59 N.C. App. 584, 297 S.E.2d 774 (1982).

Pattern or Course of Violent Conduct. — Where, in addition to evidence relating to the violent acts committed by defendant at the date of the crimes in question, there was evidence that prior to that date defendant had hit several members of his family during attacks of rage, shot a gun while angry at one of

his neighbors, hit his boss at another company where he once worked, and was involved in two fist fights, there was sufficient evidence that defendant had engaged in a pattern or course of violent conduct to support the judge's finding of that factor in aggravation, separate and apart from evidence of psychiatrist which supported the additional aggravating factor relating to defendant being a dangerous and mentally abnormal person. Thus the trial court's findings in aggravation were not based on the same item of evidence in violation of this section. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

Setting Course of Criminal Conduct in Motion. — In sentencing defendant on conviction of soliciting another man to commit common law robbery, it was not improper for the trial judge to find as a nonstatutory factor in aggravation that the defendant set a course of criminal conduct in motion by his own actions which ultimately resulted in the robbery with a dangerous weapon and death of the victim and the second degree burglary of his dwelling, the felonious breaking or entering of his storage shed, the felonious larceny of his truck and the taking of a large amount of cash money from his person, even though the offenses for which this factor purported to hold defendant responsible were dismissed or resulted in acquittals. *State v. Mann*, 317 N.C. 164, 345 S.E.2d 365 (1986).

Premeditation and Deliberation in Second Degree Murder Case. — As premeditation and deliberation are not elements of murder in the second degree, if a defendant charged with murder in the first degree pleads guilty to murder in the second degree, the sentencing judge may conclude that for purposes of sentencing premeditation and deliberation have been established by a preponderance of the evidence and therefore may be used as an aggravating factor. *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983).

The aggravating factor of premeditation, when proven by a preponderance of the evidence, is reasonably related to the purposes of sentencing when a defendant pleads guilty to second-degree murder. *State v. Gaynor*, 61 N.C. App. 128, 300 S.E.2d 260 (1983).

A court may properly find premeditation and deliberation to be an aggravating factor when sentencing a defendant who pleads guilty to murder in the sec-

ond degree. *State v. Carter*, 318 N.C. 487, 349 S.E.2d 580 (1986).

Malice in Manslaughter Case. — Since "malice" is not an element of voluntary manslaughter, the finding of malice as an aggravating factor did not violate the principle that evidence necessary to prove an element of the offense cannot be used to support a factor in aggravation. *State v. Heidmous*, 75 N.C. App. 488, 331 S.E.2d 200 (1985).

Danger to Self and Others. — A finding that the defendant is dangerous to himself and to others and in need of confinement to ensure his safety and the safety of others is a factor in aggravation, since it is reasonably related to the purposes of sentencing, one of which is to protect the public by restraining offenders. *State v. Ahearn*, 59 N.C. App. 44, 295 S.E.2d 621 (1982).

A defendant's dangerousness to others may be legitimately considered as an aggravating factor. *State v. Chatman*, 308 N.C. 169, 301 S.E.2d 71 (1983).

The trial judge may properly find as an aggravating factor that defendant was dangerous to others as a result of his social and emotional problems, even though evidence of his social and emotional problems is also considered in mitigation. *State v. Jones*, 66 N.C. App. 274, 311 S.E.2d 351 (1984).

Absent evidence that a defendant poses a greater threat to the public than any other defendant convicted of assault with a deadly weapon with intent to kill inflicting serious injury, it is error to find this factor in aggravation. It must be assumed that in setting the presumptive sentence the General Assembly was aware that a person convicted of assault with a deadly weapon with intent to kill inflicting serious injury is a person who is dangerous to others. *State v. Vaught*, 80 N.C. App. 486, 342 S.E.2d 536, aff'd in part and rev'd in part on other grounds, 318 N.C. 480, 349 S.E.2d 583 (1986).

Finding of Dangerousness Upheld. — The trial court's finding as a factor in aggravation that defendant was a dangerous and mentally abnormal person would be upheld where the evidence showed that defendant suffered from post-traumatic stress disorder at the time of the incident for which he was convicted, and the expert testimony also revealed strong indications that defendant had psychotic potential when he was under emotional stress. *State v.*

Avery, 315 N.C. 1, 337 S.E.2d 786 (1985).

Finding of Dangerousness Not Upheld. — Evidence that the defendant harbored deep resentment against her former lover, who testified against her, was not sufficient to support a finding that the defendant posed a danger to others. *State v. Vaught*, 318 N.C. 480, 349 S.E.2d 583 (1986).

Drug Activities. — Where the evidence of defendant's bad character related in part to his activities in the illegal drug trade, it bore a reasonable relationship to the purposes of sentencing for offenses under § 90-95 by demonstrating his increased culpability and was a proper aggravating factor. *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

Intent to Sell Controlled Substance. — Intent to sell is not an element of manufacturing, transporting or possessing 28 grams or more of heroin, the reason a person possesses, manufactures or transports the heroin being irrelevant; therefore, the trial judge properly found as an aggravating factor that defendant had the specific intent to sell the heroin that he possessed. *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

Conspiracy. — Aggravating factor that defendant, although not charged with the crime of conspiracy, entered into a conspiracy to aid and abet another person in the commission of a felony held not supported by a preponderance of the evidence. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986).

Taking Firearm. — In sentencing defendant on conviction for second-degree burglary, the trial judge did not err in finding as a nonstatutory aggravating factor that at the time the defendant committed the burglary he also committed larceny of a firearm, which offense was not charged in the case but which the defendant admitted performing. *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986).

Gun Battle. — Where no evidence was presented which tended to show that defendant, convicted of obtaining and attempting to obtain a controlled substance by fraud and forgery, knew that her accomplice was armed, the nonstatutory aggravating factor that accomplice and deputy engaged in a gun battle in which accomplice was killed and the deputy was wounded, as found by the trial judge, was improper and a new sen-

tencing hearing would be required. *State v. Baynard*, 79 N.C. App. 559, 339 S.E.2d 810 (1986).

A defendant's bad character and reputation can be a proper nonstatutory aggravating factor. *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

Defendant's acknowledged participation under oath in other felonies could properly be considered as pertaining to his character and as a nonstatutory aggravating factor for purposes of sentencing, where defendant had placed his character directly in issue. *State v. Moore*, 317 N.C. 275, 345 S.E.2d 217 (1986).

Probationary Status of Defendant. — It is not error for the trial court to base a factor in aggravation upon evidence that defendant is on probation, as long as the finding of such a factor in aggravation is reasonably related to sentencing. *State v. McLean*, 74 N.C. App. 224, 328 S.E.2d 451 (1985), appeal dismissed, 316 N.C. 199, 341 S.E.2d 573 (1986).

Lack of Remorse. — For the State to prove lack of remorse as an aggravating circumstance, it is not enough to show merely that there was no remorse at the very time the crime was being committed. If, sometime after the commission of the crime, when defendant has had an opportunity to reflect on his criminal deed, remorse does not come, and there is evidence of this fact, then lack of remorse may properly be found by the sentencing judge as an aggravating circumstance. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Since evidence which shows that defendant exhibited remorse for the crime could support finding the statutory mitigating factor that defendant voluntarily acknowledged wrongdoing prior to the arrest or at an early stage of the criminal process, assuming *arguendo* that the record contained evidence showing that defendant exhibited no remorse prior to arrest or at an early stage of the criminal process, this lack of remorse could not be the basis for an additional written finding of a factor in aggravation. *State v. Coleman*, 80 N.C. App. 271, 341 S.E.2d 750, cert. denied, 318 N.C. 285, 347 S.E.2d 466 (1986).

Perjury as an Aggravating Factor. — The Fair Sentencing Act does not specifically preclude a finding of perjury as an aggravating factor to be weighed in considering the sentence to be imposed upon a defendant, provided, of course,

that the finding meets the requirements of this section; however, in view of some of the potential dangers inherent in this particular factor, and also of its peculiar nature, a trial judge should exercise extreme caution in this area and should refrain from finding perjury as an aggravating factor except in the most extreme case. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

Sentencing judges should not indiscriminately treat as a perjurer every convicted defendant who has testified in his own defense. Witnesses induced by sordid motives or fear have been known to fabricate accusations with such guile that even conscientious triers of fact have been misled. Moreover, some essential elements of proof of criminal conduct, such as knowledge, intent, malice and premeditation are sometimes so subjective that testimony about them cannot be readily categorized as true or false. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

Judges must constantly bear in mind that neither they nor jurors are infallible. A verdict of guilty means only that guilt has been proved beyond a reasonable doubt, not that the defendant has lied in maintaining his innocence. It is better in the usual case for the trial judge who suspects perjury to request an investigation. Then, if the facts warrant it, the State may institute prosecution for this separate and distinct crime. *State v. Thompson*, 310 N.C. 209, 311 S.E.2d 866 (1984).

Defendant's testimony must be undeniably perjured to constitute an "extreme case" and to warrant a finding of the aggravating factor that he committed perjury. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986).

A defendant may not be penalized for electing to plead not guilty. *State v. Edwards*, 310 N.C. 142, 310 S.E.2d 610 (1984).

Contradicted Testimony Is Not Sufficient to Find Failure to Testify Truthfully. — In order to carry out presumptive sentencing as mandated by the General Assembly, a judge cannot find as an aggravating factor that the defendant did not testify truthfully, when the only evidence of his untruthfulness is his contradicted testimony at a voir dire hearing or during the trial. *State v. Setzer*, 61 N.C. App. 500, 301 S.E.2d 107, cert. denied, 308 N.C. 680, 304 S.E.2d 760 (1983).

Deterrence. — Court erred in finding

as factors in aggravation that sentence given was necessary to deter others, and that a lesser sentence would unduly depreciate the seriousness of the crime. These two factors fall within the exclusive realm of the legislature and were presumably considered in determining presumptive sentences. While both factors serve as legitimate purposes for imposing an active sentence, neither may form the basis for increasing or decreasing a presumptive term because neither relates to the character or conduct of the offender. *State v. Chatman*, 308 N.C. 169, 301 S.E.2d 71 (1983).

Since deterrence, a basic purpose of all sentencing, was necessarily considered by the legislature in establishing presumptive sentences for the various crimes, it cannot also be the basis for trial judges exceeding the presumptive terms. *State v. Partridge*, 66 N.C. App. 427, 311 S.E.2d 53, cert. denied, 310 N.C. 629, 315 S.E.2d 695 (1984).

Deterrence factor is embodied within each presumptive term, and courts should not consider it further in sentencing offenders. *State v. McGuire*, 78 N.C. App. 285, 337 S.E.2d 620 (1985).

Insufficient Presumptive Sentence. — It is error for the trial judge to find, as an additional aggravating factor, that the presumptive sentence of 15 years does not do justice to the seriousness of the crime. *State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983).

N. Elements of Offense.

"The Offense" Defined. — "The offense," as used in subsection (a) of this section, refers to the criminal charge of which the defendant is convicted or to which he pleads guilty or no contest. Had the legislature intended that the crime charged was "the offense," language such as "the crime charged was committed" would have been used throughout the subsection. *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983).

Circumstances that are inherent in the crime of which defendant is convicted may not be used as aggravating factors in order to increase the punishment beyond what the legislature has set for the offense involved. *State v. Coffey*, 65 N.C. App. 751, 310 S.E.2d 123 (1984).

It is error for an aggravating factor to be based on circumstances which are part of the very essence of a crime, because it can be presumed that the legis-

lature was guided by this fact when it established presumptive sentences. *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985).

Section 15A-2000 Compared. — Section 15A-2000 does not contain a statutorily-mandated proscription against the use of evidence necessary to prove an element of the offense, as does this Article. *State v. Morris*, 59 N.C. App. 157, 296 S.E.2d 309, cert. denied and appeal dismissed, 307 N.C. 471, 299 S.E.2d 227 (1983).

Many of the factors listed under subdivision (a)(1) contemplate a duplication in proof without violating the proscription that evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation. *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983).

Consideration of Fact Constituting Element of Offense That Was Dropped as Part of Plea Bargain. — It is not a violation of defendant's constitutional due process rights to consider as aggravating a fact which is an element of a charge dropped in exchange for a plea bargain, where the dismissed charge is not used in aggravation. The trial judge may use any aggravating or mitigating factors which are proved by a preponderance of the evidence. *State v. Jones*, 59 N.C. App. 472, 297 S.E.2d 132 (1982), cert. denied, 307 N.C. 577, 299 S.E.2d 651 (1983).

The mere fact that a guilty plea has been accepted pursuant to a plea bargain does not preclude the sentencing court from reviewing all of the circumstances surrounding the admitted offense in determining the presence of aggravating or mitigating factors. *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983).

Where the crime that defendant is convicted of is based on the relationship of parent and child, that relationship cannot be used again to exceed the presumptive sentence. *State v. Young*, 67 N.C. App. 139, 312 S.E.2d 665 (1984).

Factors Held Not Elements of § 90-95. — While subdivision (a)(1) of this section prohibits using evidence necessary to prove an element of the offense to prove a factor in aggravation, that the offense was committed for hire or pecuniary gain and involved an attempted or actual taking of property of great monetary value or damage causing great monetary loss, or that the of-

fense involved an unusually large quantity of contraband, are aggravating factors which are not elements of § 90-95(a)(1). *State v. Thobourne*, 59 N.C. App. 584, 297 S.E.2d 774 (1982).

O. Joinable Offenses.

Using Evidence Establishing Element of Offense to Prove Aggravating Factor. — The Fair Sentencing Act prohibits using evidence that establishes an element of the offense to prove an aggravating factor. *United States v. Price*, 812 F.2d 174 (4th Cir. 1987).

Evidence of Element of Joined Offense. — The prohibition in subsection (a)(1), against using the same evidence to prove both an element of the offense and a factor in aggravation does not also extend to using evidence necessary to prove an element of a joined or joinable offense for which defendant was convicted. *State v. Wright*, — N.C. —, 353 S.E.2d 214 (1987).

The commission of a joinable offense is not an aggravating factor. *State v. Taylor*, 74 N.C. App. 326, 328 S.E.2d 27, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985); *State v. Cofield*, 77 N.C. App. 699, 336 S.E.2d 439 (1985).

Convictions for Joinable Offenses May Not Be Considered. — This section specifically prohibits, as an aggravating factor, the use of convictions for offenses joinable, under Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced. To permit the trial judge to find as a nonstatutory aggravating factor that the defendant committed the joinable offense would virtually eviscerate the purpose and policy of the statutory prohibition. *State v. Lattimore*, 310 N.C. 295, 311 S.E.2d 876 (1984); *State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154 (1985); *State v. McGuire*, 78 N.C. App. 285, 337 S.E.2d 620 (1985).

Subdivision (a)(1) specifically prohibits, as an aggravating factor, the use of convictions for offenses joinable, under Chapter 15A, with the crime or crimes for which the defendant is currently being sentenced. *State v. McGuire*, 78 N.C. App. 285, 337 S.E.2d 620 (1985).

A conviction of an offense covered by the Fair Sentencing Act may not be aggravated by contemporaneous convictions of offenses joined with such offense. *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985).

A conviction may not be aggravated

by contemporaneous convictions of offenses joined with such offense. *State v. Westmoreland*, 314 N.C. 442, 334 S.E.2d 223 (1985); *State v. Hanes*, 77 N.C. App. 222, 334 S.E.2d 444 (1985).

Nor May Joinable Offense Not Charged Be Used. — The use of evidence of an element of a joinable offense with which defendant has not been charged to show additional criminal acts committed during the crime for which defendant is being sentenced as factors in aggravation is even less valid than the use of evidence of the commission of a joinable offense for which a defendant has been convicted. *State v. Puckett*, 66 N.C. App. 600, 312 S.E.2d 207 (1984).

It is error to use as an aggravating factor evidence of an element of a joinable offense with which defendant has not been charged. In order for the trial court to impose a prison sentence on defendant for committing such an act, the State must charge the defendant and prove beyond a reasonable doubt that he committed the offense. *State v. McGuire*, 78 N.C. App. 285, 337 S.E.2d 620 (1985).

Dismissed Joinable Offense May Be Aggravating Factor. — A trial court may properly consider evidence in support of an aggravating factor even though the same evidence might also prove an element of an offense joinable with the offense for which defendant is being sentenced, if the joinable offense has been dismissed. *State v. Teeter*, — N.C. App. —, 355 S.E.2d 804 (1987).

Offense Held Joinable. — Finding of the trial court that after committing the offense of second-degree rape and thereafter stating to the victim that she was going to tell on him and have him hung, defendant choked the victim until she was unconscious, involved an offense separate but joinable with the rape charge, which could not be used as an aggravating factor. *State v. Cofield*, 76 N.C. App. 699, 336 S.E.2d 439 (1985).

Robbery and malicious throwing of acid were joinable offenses under § 15A-926(a), which permits joinder of offenses based on the same act or transaction or on a series of acts or transactions connected together, and use of the fact that the acid was thrown after the robbery to aggravate sentence for the malicious throwing of acid was prohibited by subdivision (a)(1) of this section. *State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154 (1985).

III. MITIGATING FACTORS.

A. In General.

The defendant has the burden of proving mitigating factors by a preponderance of the evidence. *State v. Ingram*, 65 N.C. App. 585, 309 S.E.2d 576 (1983), cert. denied, 310 N.C. 479, 312 S.E.2d 888 (1984); *State v. Bare*, 77 N.C. App. 516, 335 S.E.2d 748 (1985), cert. denied, 315 N.C. 392, 338 S.E.2d 881 (1986).

The defendant bears the burden of proof to establish the existence of mitigating factors. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985).

The defendant bears the burden of persuasion on mitigating factors. *State v. Taylor*, 309 N.C. 570, 308 S.E.2d 302 (1983); *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Defendant bears the burden of persuasion on mitigating factors if he seeks a term less than the presumptive. Thus, when a defendant argues that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence, his position is analogous to that of a party with the burden of persuasion seeking a directed verdict. *State v. Braswell*, 78 N.C. App. 498, 337 S.E.2d 637 (1985).

Defendant has the burden of persuading by a preponderance of the evidence that mitigating factors exist. That evidence must be uncontradicted, substantial and manifestly credible. *State v. Vanstory*, — N.C. App. —, 353 S.E.2d 236 (1987).

Defendant's Position Analogous to One Seeking Directed Verdict.

When defendant argues that his evidence is such as to compel the finding of a mitigating factor, his position is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the court to conclude that the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn, and that the credibility of the evidence is manifest as a matter of law. *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983); *State v. Taylor*, 309 N.C. 570, 308 S.E.2d 302 (1983); *State v. Ingram*, 65 N.C. App. 585, 309 S.E.2d 576 (1983), cert. denied, 310 N.C. 479, 312 S.E.2d 888 (1984); *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

The sentencing judge is required to find in mitigation any factor proved by uncontradicted, manifestly

credible evidence. *State v. Seagroves*, 78 N.C. App. 49, 336 S.E.2d 684 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 905 (1986).

When evidence in support of a particular mitigating factor is uncontradicted, substantial, and there is no reason to doubt its credibility, to permit the sentencing judge simply to ignore it would eviscerate the Fair Sentencing Act. *State v. Milam*, 65 N.C. App. 788, 310 S.E.2d 141 (1984); *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985); *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Failure to Find Mitigating Factor Supported by Evidence Is Error. — Where the State's own unequivocal evidence clearly establishes the existence of a factor in mitigation which the legislature has included among those which must be considered, it is error for the trial judge to fail to find that factor. *State v. Graham*, 61 N.C. App. 271, 300 S.E.2d 716, modified on other grounds and aff'd, 309 N.C. 587, 308 S.E.2d 311 (1983).

Failure to find a mitigating factor when the evidence in support of such is substantial constitutes reversible error. However, in order for the appellate court to make the determination of whether evidence of this nature was introduced at trial and at the sentencing hearing, the record on appeal must reveal what the evidence is in a direct and concise manner. *State v. Milam*, 65 N.C. App. 788, 310 S.E.2d 141 (1984).

Where the evidence in support of a mitigating factor is uncontradicted and manifestly credible, it is error for the trial court to fail to find such mitigating factor. *State v. Bullard*, 79 N.C. App. 440, 339 S.E.2d 664 (1986).

But Court's Failure Will Not Be Overturned Absent Substantial Evidence. — The failure of the court to find a factor in mitigation urged by defendant will not be overturned on appeal unless the evidence in support of the factor is uncontradicted, substantial, and there is no reason to doubt its credibility. *State v. Lane*, 77 N.C. App. 741, 336 S.E.2d 410 (1985).

Unsupported Mitigating Factors May Be Rejected. — A trial court must find a factor in mitigation if it is supported by uncontroverted, substantial and inherently credible evidence; on the other hand, should the defendant fail to produce such evidence, the trial judge may reject the proposed factors. *State v.*

Bare, 77 N.C. App. 516, 335 S.E.2d 748 (1985), cert. denied, 315 N.C. 392, 338 S.E.2d 881 (1986).

When Judge Must Find Factor Not Submitted by Defendant. — The duty of the trial judge to find a mitigating factor that has not been submitted by defendant arises only when the evidence offered at the sentencing hearing supports the existence of a mitigating factor specifically listed in subdivision (a)(2) and when the defendant meets the burden of proof established in *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983). The trial judge is not required to consider whether the evidence supports the existence of nonstatutory mitigating factors in the absence of a specific request by defense counsel. *State v. Gardner*, 312 N.C. 70, 320 S.E.2d 688 (1984).

The trial judge only has a duty to find a statutory mitigating factor that was not submitted by defendant when the evidence offered at the sentencing hearing in support of the factor in mitigation is both uncontradicted and manifestly credible. *State v. Torres*, 77 N.C. App. 345, 335 S.E.2d 34 (1985).

The duty of the trial judge to find a statutory mitigating factor that has not been submitted by defendant arises only when defendant meets the burden of proof established in *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983), i.e., the evidence in support of the statutory factor must be substantial, uncontradicted and manifestly credible. *State v. Rathbone*, 78 N.C. App. 58, 336 S.E.2d 702 (1985), cert. denied, 316 N.C. 200, 341 S.E.2d 582 (1986).

The trial court is required to find a statutory mitigating factor if proved by a preponderance of the evidence, even in the absence of a specific request. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985).

Consideration of Nonstatutory Factors Is Permitted But Not Required. — Regarding nonstatutory factors that are proven by a preponderance of the evidence and are reasonably related to the purposes of sentencing, such as conduct while awaiting sentencing, the trial judge may consider them, but such consideration is not required. *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

And Is Entrusted to Judge's Discretion. — Although failure to find a statutory mitigating factor supported by uncontradicted, substantial and manifestly credible evidence is reversible

error, a trial judge's consideration of a nonstatutory factor which is (1) requested by the defendant, (2) proven by uncontradicted, substantial and manifestly credible evidence, and (3) mitigating in effect, is a matter entrusted to the sound discretion of the sentencing judge under subsection (a). *State v. Spears*, 314 N.C. 319, 333 S.E.2d 242 (1985); *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

Judge's Failure to Consider a Nonstatutory Factor Will Not Be Disturbed Absent Abuse. — While a failure to find a statutory mitigating factor which is supported by uncontradicted, substantial and manifestly credible evidence is reversible error, a trial judge's failure to find a nonstatutory mitigating factor, even when that factor is (1) requested by defendant; (2) proven by uncontradicted, substantial and manifestly credible evidence; and (3) mitigating in effect, will not be disturbed absent a showing of abuse of discretion. *State v. Swimm*, 312 N.C. 24, 340 S.E.2d 65 (1986).

A trial judge's failure to find a nonstatutory mitigating factor will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

The same evidence may not be used to find more than one mitigating factor; each mitigating factor can be found only if there is separate evidence to support it. *State v. Crandall*, 83 N.C. App. 37, 348 S.E.2d 826 (1986).

Separate Findings Must Be Made for Each Offense. — Court did not err in failing to find as a mitigating factor in sentencing defendant for felonious larceny and armed robbery that defendant was suffering from a physical condition which reduced his culpability, even though the court found this factor in mitigation of his second-degree murder offense, as when one sentencing hearing addresses multiple offenses, the trial judge must treat each offense separately and make separate findings as to the aggravating and mitigating factors for each. *State v. Coleman*, 80 N.C. App. 271, 341 S.E.2d 750, cert. denied, 318 N.C. 285, 347 S.E.2d 466 (1986).

Factors Found by Jury in Capital Case Need Not Be Found by Judge in Non-Capital Case. — Fact that the trial court did not find as mitigating factors in noncapital felony cases all of the mitigating factors specifically found by the jury in the sentencing phase of capi-

tal case did not constitute error. *State v. Avery*, 315 N.C. 1, 337 S.E.2d 786 (1985).

The trial judge, in the sentencing phase of crimes coming within this section, was not bound by the jury's finding in the sentencing phase of a capital charge that the defendant had a reputation for good character in the community in which he lived and led a law abiding life for a substantial period of time prior to his present convictions, especially in the light of the fact that these mitigating factors were not supported by uncontradicted evidence. *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

Circumstances set forth in paragraphs (a)(2)d and (a)(2)e are different. The former deals with a mental disease or illness, such as chronic brain syndrome. The latter concerns a defendant's "immaturity" or "limited mental capacity." *State v. Taylor*, 309 N.C. 570, 308 S.E.2d 302 (1983).

Effect of Alibi on Mitigating Factors. — The sentencing judge cannot, as a matter of law, refuse to consider mitigating factors after a jury has determined that defendant committed the crime, even though defendant has presented an alibi defense at the guilt determination stage of the trial. *State v. Brooks*, 68 N.C. App. 298, 314 S.E.2d 565 (1984).

Counsel's Statements Not Evidence of Nonstatutory Mitigating Factors. — Absent a stipulation by the prosecution, statements made by defense counsel during argument at the sentencing hearing do not constitute evidence which would support a finding of nonstatutory mitigating factors. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986).

B. Passive or Minor Role.

Proof May Support Two Factors. — Proof of either passive participation or performance of a minor role, by the preponderance of the evidence, is sufficient to support the finding of a mitigating factor; thus, proof of both types of conduct may suffice to support the finding of two mitigating factors, so as to reflect the defendant's lesser culpability. *State v. Crandall*, 83 N.C. App. 37, 348 S.E.2d 826 (1986), holding, however, that the court was not required to find two separate mitigating factors absent separate evidence supporting each.

Attempt to Dissuade Co-Defendant

Not Controlling. — Although the attempt to dissuade a co-defendant and the failure to do so constitutes evidence to be considered in determining whether the defendant was a passive participant in the crime, this is not the controlling factor. *State v. Parker*, — N.C. —, 355 S.E.2d 489 (1987).

Evidence did not so clearly establish that defendant was a passive participant in murder that no reasonable inferences to the contrary could be drawn, and trial judge therefore did not err in failing to find this mitigating circumstance. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

C. Mental or Physical Condition.

A “mental condition” is defined as a mental disease or illness. *State v. Hall*, — N.C. App. —, 355 S.E.2d 250 (1987).

Evidence of Condition, Without More, Is Not Sufficient. — A mental or physical condition may be capable of reducing a defendant's culpability for an offense. However, evidence that the condition exists, without more, does not mandate consideration as a mitigating factor pursuant to subdivision (a)(2)d of this section. *State v. Grier*, 70 N.C. App. 40, 318 S.E.2d 889 (1984), cert. denied, 318 N.C. 698, 350 S.E.2d 860 (1986).

Since there was no evidence that defendant suffered from a mental disease or illness, subsection (a)(2)d of this section was simply inapplicable to defendant who had an IQ of 79, was functioning at a below average level in terms of intelligence, and was below average in his ability to see causes and consequences of behavior. *State v. Hall*, — N.C. App. —, 355 S.E.2d 250 (1987).

While a mental or physical condition, such as alcoholism, may be capable of reducing a defendant's culpability for an offense, evidence that the condition exists, without more, does not mandate consideration as a mitigating factor. Defendant has the burden of proof with respect to any alleged mitigating factors. *State v. Salters*, 65 N.C. App. 31, 308 S.E.2d 512 (1983), cert. denied, 310 N.C. 479, 312 S.E.2d 889 (1984).

While a mental or physical condition, such as drug abuse, may be capable of reducing a defendant's culpability for an offense, evidence that the condition exists, without more, does not mandate consideration as a mitigating factor. *State v. Bush*, 78 N.C. App. 686, 338 S.E.2d 590 (1986).

Condition Must Precede Criminal Act. — Defendant's contention that as a result of having been shot he suffered from a mental or physical condition that reduced his culpability was without merit, where he was wounded after he initiated a shootout. Mental and physical conditions recognized as possible mitigating factors have been those which existed prior to a defendant's criminal act. Since his own culpable conduct led to his being shot, he could not properly claim diminished responsibility on that account. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

Intoxication is not enumerated as a separate mitigating factor under the provisions of subdivision (a)(2) of this section. However, intoxication of a defendant may be appropriately considered in mitigation under the statutory mitigating factor contained in paragraph (a)(2)d of this section. *State v. Barranco*, 73 N.C. App. 502, 326 S.E.2d 903 (1985).

Alcohol intoxication, or drunkenness, exists when there is a material impairment of mental or physical faculties, or both, induced by excessive consumption of alcohol. Thus, intoxication may constitute a mental condition or a physical condition. The mitigating effect, if any, of intoxication upon an offender's culpability will depend upon the circumstances of each case. *State v. Barranco*, 73 N.C. App. 502, 326 S.E.2d 903 (1985).

Ignorance of the legal implications of an act, nothing else appearing, is not tantamount to a mental condition sufficient to reduce one's culpability. *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983).

D. Immaturity or Limited Mental Capacity.

The mitigating factor in subdivision (a)(2)e involves two inquiries: one as to immaturity (or mental capacity) and one as to the effect of such immaturity upon culpability. Clearly, age alone is insufficient to support this factor. *State v. Moore*, 317 N.C. 275, 345 S.E.2d 217 (1986).

The trial court's determination under subsection (a)(2)e involves a two part inquiry: (1) Whether the defendant suffers from a limited mental capacity (or from “immaturity”), and (2) if so, its effect on his culpability for the offense. *State v. Hall*, — N.C. App. —, 355 S.E.2d 250 (1987).

“Limited mental capacity,” as used

in subdivision (a)(2)e of this section, is used in the sense of limited intelligence or low I.Q. *State v. Taylor*, 309 N.C. 570, 308 S.E.2d 302 (1983); *State v. Hall*, — N.C. App. —, 355 S.E.2d 250 (1987); *State v. Arnette*, — N.C. App. —, 355 S.E.2d 498 (1987).

Intoxication does not support a finding of the mitigating factor found in subdivision (a)(2)e of this section. *State v. Barranco*, 73 N.C. App. 502, 326 S.E.2d 903 (1985).

Age Alone Insufficient to Show Immaturity. — Defendant being 16, at the time of second-degree rape of 11 year old victim, by itself, failed to show that his immaturity significantly reduced his culpability. *State v. Vanstory*, — N.C. App. —, 353 S.E.2d 236 (1987).

Factor Not Found Despite Some Evidence. — While report which stated that defendant's IQ was 79, that he was functioning at a below average level in terms of intelligence, and that he was below average in his ability to see causes and consequences of behaviors was some evidence of a limited mental capacity, which would reduce defendant's culpability for the offense, it did not require the trial court to find it as a mitigating factor. *State v. Hall*, — N.C. App. —, 355 S.E.2d 250 (1987).

Evidence Held Insufficient. — Where the only evidence presented as to defendant's intelligence or I.Q. was that defendant had earned an associate degree in mechanical engineering from the University of Kentucky, this evidence was insufficient to support defendant's contention of limited mental capacity. *State v. Arnette*, — N.C. App. —, 355 S.E.2d 498 (1987).

E. Participation or Consent of Victim.

Burden of Proof under Paragraph (a)(2)g. — Although under paragraph (a)(2)g of this section a defendant is entitled to a factor in mitigation when the victim was more than 16 years of age and defendant's conduct was "consented to," the burden of establishing both of the conditions stated is on the defendant. *State v. Elliott*, 77 N.C. App. 647, 335 S.E.2d 774 (1985).

Paid police informant who volunteered to purchase cocaine in furtherance of a police investigation was not a "victim" within the meaning of paragraph (a)(2)g of this section. *State v. David*, 80 N.C. App. 327, 342 S.E.2d

50, cert. denied, — N.C. —, 347 S.E.2d 445 (1986).

F. Aid in Apprehension or Prosecution of Another.

Willingness to Testify against Co-defendant. — Evidence that a defendant testified truthfully against a codefendant is one statutory factor which a trial judge must consider in passing sentence under this Article. However, evidence that a defendant was merely willing to testify against a codefendant does not meet the statutory requirement. Nevertheless, a trial judge may properly consider nonstatutory mitigating factors in setting a sentence, so long as those factors are logically related to the purposes of sentencing. The crucial difference is that a trial judge must consider the presence or absence of the statutory mitigating and aggravating factors; whereas a trial judge may, but is not required to consider nonstatutory mitigating factors. *State v. Hinnant*, 65 N.C. App. 130, 308 S.E.2d 732 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

Cooperative Conduct. — If he finds that defendant's conduct was cooperative, though not sufficient to fit within paragraph (a)(2)h, the judge may consider it as a factor in mitigation of his sentence. *State v. Salters*, 65 N.C. App. 31, 308 S.E.2d 512 (1983), cert. denied, 310 N.C. 479, 312 S.E.2d 889 (1984).

Aid to Police after Repeated Refusals to Admit Wrongdoing. — Where police obtained a search warrant which led to the discovery of victim's body on the basis of defendant's statement, but they extracted this statement from defendant only after substantial time and effort and repeated refusals on the part of defendant to admit wrongdoing in connection with the offense, the sentencing judge could have found that whatever consideration defendant earned by helping police locate the body was offset by his earlier persistent denials of wrongdoing; thus, judge's failure to find defendant's statement to be an early acknowledgement of wrongdoing was not an abuse of discretion. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985).

Defendant Held Entitled to Factor. — Where there was uncontradicted, manifestly credible testimony to the effect that defendant aided in the apprehension of another felon or testified truthfully for the State in another felony

prosecution in a neighboring prosecutorial district, defendant was entitled to have that fact in mitigation found and considered by the court before sentence was imposed. *State v. Cartwright*, 81 N.C. App. 144, 343 S.E.2d 557 (1986).

Error in Not Finding Factor. — The trial court erred by not finding as a mitigating factor that defendant aided in the apprehension of another felon where there was uncontradicted testimony by an SBI agent that defendant's statements led to the apprehension of other felons. *State v. Flowers*, — N.C. App. —, 354 S.E.2d 240 (1987).

G. Strong Provocation or Extenuating Relationship.

"Strong provocation," as used in paragraph (a)(2)i, is not synonymous with "legal provocation" necessary to establish a defense and reduce a second-degree murder to manslaughter. Ample support for this conclusion is found in that portion of subdivision (a)(2)i of this section which states that the existence of an extenuating relationship between the defendant and the victim is a mitigating factor. *State v. Wood*, 61 N.C. App. 446, 300 S.E.2d 903, cert. denied, 308 N.C. 547, 302 S.E.2d 884 (1983).

Threat or Challenge Must Be Shown. — Provocation within the meaning of subdivision (a)(2)i requires a showing of a threat or challenge by the victim to the defendant. *State v. Braswell*, 78 N.C. App. 498, 337 S.E.2d 637 (1985); *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

Circumstances That Shift Part of Fault Intended. — In enacting paragraph (a)(2)i of this section, the legislature apparently had in mind circumstances that morally shift part of the fault for a crime from the criminal to the victim. *State v. Martin*, 68 N.C. App. 272, 314 S.E.2d 805 (1984).

"Strong provocation" as a mitigating factor is a conclusion which a court may or may not reach from uncontradicted evidence. *State v. Cameron*, 71 N.C. App. 776, 323 S.E.2d 396 (1984), *aff'd*, 314 N.C. 516, 335 S.E.2d 9, cert. denied, 313 N.C. 510, 329 S.E.2d 395 (1985).

When Finding of Strong Provocation Is Compelled. — When evidence is offered to support a claim of a mitigating factor of strong provocation, the trial judge first must determine what facts are established by the preponderance of the evidence, and then determine

whether those facts support a conclusion of strong provocation. Only if the evidence offered at the sentencing hearing so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn is the court compelled to find that the mitigating factor exists. *State v. Clark*, 314 N.C. 638, 336 S.E.2d 83 (1985).

Legislature did not intend to provide shorter prison terms for defendants motivated by jealousy or rage. *State v. Puckett*, 66 N.C. App. 600, 312 S.E.2d 207 (1984).

Extenuating Relationship Not Shown. — In a prosecution for murder, although the evidence that defendant and victim had been arguing over an extended period of time was not contradicted, this evidence did not compel a finding that their relationship was "otherwise extenuating," because such evidence did not necessarily lessen the seriousness of the crime committed. *State v. Bullard*, 79 N.C. App. 440, 339 S.E.2d 664 (1986).

H. Lack of Foreseeability or Exercise of Caution.

Defendant's Attempts to Restrain Himself Not Contemplated. — That defendant could not reasonably foresee that his conduct would cause or threaten serious bodily harm or fear, or that defendant exercised caution to avoid such consequences, is a mitigating factor that is present when a defendant takes action to avoid harmful results of his criminal action, such as ensuring that accomplices are not armed with weapons. It does not refer to attempts by a criminal defendant to restrain himself from committing the criminal act itself. *State v. Puckett*, 66 N.C. App. 600, 312 S.E.2d 207 (1984).

Purpose of Factor. — The statutory factor in paragraph (a)(2)j was not designed to benefit an offender who merely chooses to commit lesser crimes when greater ones are within his grasp. *State v. Arnette*, — N.C. App. —, 355 S.E.2d 498 (1987).

When Factor Available. — The mitigating factor in paragraph (a)(2)j is available only when a defendant exercises caution to prevent or cannot reasonably foresee harm that actually occurs. *State v. Arnette*, — N.C. App. —, 355 S.E.2d 498 (1987).

The simple fact that defendant could have broken into occupied cars instead of unoccupied cars was

insufficient to invoke the mitigating factor in paragraph (a)(2)j. *State v. Arnette*, — N.C. App. —, 355 S.E.2d 498 (1987).

I. Voluntary Acknowledgment of Wrongdoing.

Two Opportunities for Mitigation.

— Subdivision (a)(2)l of this section makes it clear that a criminal defendant has two opportunities to mitigate the sentence that he might be given on a guilty plea or verdict. *State v. Graham*, 61 N.C. App. 271, 300 S.E.2d 716, modified on other grounds and *aff'd*, 309 N.C. 587, 308 S.E.2d 311 (1983).

Purpose of Factor. — One purpose of the mitigating factor of voluntarily acknowledging wrongdoing prior to arrest or at an early stage is to allow a sentencing judge to give some credit to a defendant who by early confession spares law enforcement officers expense and trouble which might otherwise be required to resolve the crime. Another purpose is to allow a sentencing judge to recognize that the earlier one admits responsibility, the better one's chance of rehabilitation. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985).

Defendant Must Admit Culpability, Responsibility or Remorse. — To prove the mitigating factor of acknowledging wrongdoing at an early stage, defendant must have admitted culpability, responsibility or remorse, as well as guilt. *State v. Rathbone*, 78 N.C. App. 58, 336 S.E.2d 702 (1985), cert. denied, 316 N.C. 200, 341 S.E.2d 582 (1986).

Meaning of "Criminal Process." — The legislature contemplated that "the criminal process," as used in subdivision (a)(2)l of this section, involves formal legal proceedings and not merely investigation of crimes by law enforcement officers. *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983).

When "Criminal Process" Begins. — The "criminal process" begins upon either the issuance of a warrant or information, or upon the return of a true bill of indictment or presentment, or upon arrest, whichever comes first. *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983); *State v. Hayes*, 314 N.C. 760, 334 S.E.2d 741 (1985); *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985).

Time of Making Confession. — If defendant's confession is made prior to the issuance of a warrant or information, or upon the return of a true bill of indictment or presentment, or prior to

arrest, whichever comes first, he is entitled to a finding of the mitigating circumstance set forth in paragraph (a)(2)l of this section. *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983); *State v. Hayes*, 314 N.C. 760, 334 S.E.2d 741 (1985).

A defendant is entitled to a finding of this statutory mitigating factor if his confession was made prior to the issuance of a warrant or information, prior to the return of a true bill of indictment or presentment, or prior to arrest, whichever comes first. Otherwise, it is for the trial judge to determine, in his discretion, whether a statement was made at a sufficiently early stage of the criminal process as to qualify as a mitigating circumstance. *State v. Thompson*, 314 N.C. 618, 336 S.E.2d 78 (1985).

Confession after arrest is not automatically disqualified as a voluntary acknowledgment of wrongdoing at an early stage of the criminal process. Rather, it is for the trial judge to decide, in his discretion, whether the statement was made at a sufficiently early stage of the criminal process to qualify as a mitigating factor. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985).

Burden of Proving Confession Sufficiently Early. — Where the evidence established that defendant, after being stopped by police, confessed to committing other crimes, giving police a fictitious name, although later he gave police his real name, but no evidence was presented establishing when in the criminal process the confession was made, defendant failed to meet his burden of proof and was not entitled to the finding of the factor in paragraph (a)(2)l by right. Instead, the decision was subject to the sentencing judge's discretion. *State v. Arnette*, — N.C. App. —, 355 S.E.2d 498 (1987).

Acknowledgment Not at Early Stage. — Where warrants for defendant's arrest were issued on November 16, 1984, defendant was arrested 11 days later on November 27, 1984, and he did not admit his guilt until the day after his arrest, defendant was not entitled to a finding that he acknowledged his guilt at an early stage of the criminal process. *State v. Long*, 316 N.C. 60, 340 S.E.2d 392 (1986).

Discretion of Judge. — If defendant's confession was made after indictment, arrest, or issuance of the warrant, or if defendant fails to establish by a preponderance of the evidence when the

confession was made, it is for the sentencing judge to decide, in his discretion, whether the statement was made at a sufficiently early stage of the criminal process as to qualify as a mitigating factor. *State v. Arnette*, — N.C. App. —, 355 S.E.2d 498 (1987).

Discretion as to Weight Given Acknowledgment of Wrongdoing. — Although a trial judge may be required to find in mitigation that a defendant voluntarily acknowledged wrongdoing in connection with the offense, the weight to be given to that factor remains within his sound discretion. *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983).

Consideration of Motive. — An unrepudiated acknowledgment of guilt, admissible against defendant, made before arrest or at an early stage in the criminal process, must be considered during sentencing, even if defendant's motives for the acknowledgment are suspect, overruling *State v. Sweigart*, 71 N.C. App. 383, 322 S.E.2d 188 (1984), to the extent that it is inconsistent with this holding. *State v. Daniel*, — N.C. —, 354 S.E.2d 216 (1987).

Motive in Acknowledging Guilt Goes to Weight Given It. — The defendant's motive in acknowledging his guilt at an early stage does not go to the existence of the mitigating factor of acknowledgment of wrongdoing, but goes to the weight the trial judge must give that factor. *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983); *State v. Daniel*, — N.C. —, 354 S.E.2d 216 (1987).

Whether confession reflects remorse is a matter for the fact finder to determine. *State v. Graham*, 309 N.C. 587, 308 S.E.2d 311 (1983).

Retraction of Inculpatory Statement. — The mitigating factor set out in paragraph (a)(2)l of this section reflects the assumption that a person who admits guilt and acknowledges a responsibility for his actions shows a possibility of rehabilitation which should be rewarded; however, when a defendant later retracts an inculpatory statement, this assumption of the potential for rehabilitation disappears, and it is as though no inculpatory statement was ever made. Thus, if a defendant repudiates his inculpatory statement, he is not entitled to a finding of this mitigating circumstance. *State v. Hayes*, 314 N.C. 760, 334 S.E.2d 741 (1985).

Allegation of Self-Defense. — Admission by defendant after arrest that he killed the victim did not constitute an

admission of wrongdoing, where defendant denied culpability by contending that the shooting was justified by self-defense. *State v. Clark*, 314 N.C. 638, 336 S.E.2d 83 (1985).

The trial court did not err in failing to find as a mitigating factor that, prior to arrest or at an early stage of the criminal process, the defendant voluntarily acknowledged wrongdoing, in connection with the offense, to a law enforcement officer, where, although defendant confessed the details of the shooting to a law enforcement officer, at trial he sought, unsuccessfully, to rely on self-defense, as a defendant who seeks to rely on self-defense is not entitled to this mitigating factor. *State v. Jones*, 83 N.C. App. 593, 351 S.E.2d 122 (1986).

Pleas of guilty should not be considered as mitigating factors during sentencing. *State v. Tyler*, 66 N.C. App. 285, 311 S.E.2d 354 (1984).

Factor to Be Found Though Not Requested by Defendant. — If substantial, uncontradicted, and credible evidence is presented that defendant's confession was made prior to the issuance of a warrant, or upon the return of an indictment, or prior to arrest, whichever comes first, the sentencing judge must find this factor in mitigation or commit reversible error, even if defendant has not requested this factor to be found. *State v. Arnette*, — N.C. App. —, 355 S.E.2d 498 (1987).

Factor Present if Acknowledgment Admissible. — If an acknowledgment is admissible against defendant, it is voluntary within the meaning of the mitigating circumstance of voluntary acknowledgment of wrongdoing. *State v. Daniel*, — N.C. —, 354 S.E.2d 216 (1987).

Defendant Held Entitled to Factor. — The trial judge, in sentencing a convicted murderer, erred in failing to find as a mitigating factor the fact that defendant voluntarily acknowledged wrongdoing prior to arrest, where the State's own uncontradicted evidence was that defendant told the police immediately upon their arrival at the scene that he shot his wife and then shot himself. *State v. Martin*, 68 N.C. App. 272, 314 S.E.2d 805 (1984).

Where all the evidence showed, without contradiction, that defendant made her inculpatory statement before her arrest, which statement was sufficient to clearly establish her guilt of a murder, defendant was entitled to have her ac-

knowledge of wrongdoing found as a mitigating circumstance. *State v. Daniel*, — N.C. —, 354 S.E.2d 216 (1987).

Defendant Not Entitled to Factor.

— The court was not required to find as a mitigating factor that defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process, based upon evidence that, following his arrest, he told officers of the location of knife and admitted striking victim, where the evidence failed to affirmatively show that defendant acknowledged wrongdoing, and where, while he acknowledged striking victim, defendant denied that he cut and killed him, attributing the fatal blow to someone else. *State v. Bullard*, 79 N.C. App. 440, 339 S.E.2d 664 (1986).

J. Good Character or Reputation.

Character encompasses both a person's past behavior and the opinion of members of his community arising from it. *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); *State v. Winnex*, 66 N.C. App. 280, 311 S.E.2d 594 (1984).

Good moral character is something more than the absence of bad character. It is the good name which the applicant has acquired, or should have acquired, through association with his fellows. It means that he must have conducted himself as a man of upright character ordinarily would, should or does. Such character expresses itself, not in negatives nor in following the line of least resistance, but quite often in the will to do the unpleasant thing, if it is right, and the resolve not to do the pleasant thing, if it is wrong. *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983).

Good character is something more than the absence of bad character. It means that defendant must have conducted himself as a man of upright character ordinarily would, should or does. *State v. Winnex*, 66 N.C. App. 280, 311 S.E.2d 594 (1984); *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

Good manners and a law-abiding life do not necessarily constitute a good character. *State v. Winnex*, 66 N.C. App. 280, 311 S.E.2d 594 (1984).

Evidence of Character and Reputation to Be Liberally Received. — Under paragraph (a)(2)m of this section, a defendant's character and his reputation in the community where he lives are direct issues in the case for purposes

of sentencing. Evidence of both, therefore, should be liberally received, not only because they are directly in issue, but also because the court accords more liberality in the admissibility of evidence when it is being considered by a trial judge for purposes of sentencing than when by a jury for some other purpose. *State v. Taylor*, 309 N.C. 570, 308 S.E.2d 302 (1983).

Evidence of good character or reputation must be at least substantial. *State v. Winnex*, 66 N.C. App. 280, 311 S.E.2d 594 (1984).

Proof of good character requires inherently credible evidence. Even where favorable character evidence is uncontradicted, the trial judge may determine that the witnesses are unreliable and hold that defendant has failed to meet his burden of proof. *State v. Winnex*, 66 N.C. App. 280, 311 S.E.2d 594 (1984).

For discussion of permissible indicia of unreliability of character witnesses, see *State v. Winnex*, 66 N.C. App. 280, 311 S.E.2d 594 (1984).

Methods of Proving Good Character. — When the defendant in his sentencing hearing produces evidence of his good character in order to take advantage of that particular mitigating circumstance, character becomes "a direct issue in the case," and thus is not limited to the traditional methods of proof, but may be proved by specific acts, as well as by reputation and by the opinions of others. *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983).

Good moral character is seldom subject to proof by reference to one or two incidents. *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983).

Testimony of witness that defendant was well behaved around her did not establish the fact of his good character or reputation in his community so clearly as to compel a finding of this mitigating circumstance. *State v. Brown*, 314 N.C. 588, 336 S.E.2d 388 (1985).

No Recent Conviction. — The trial judge justifiably concluded that four years without a conviction did not amount to leading a law-abiding life for a substantial period of time. *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

Defendant Not Entitled to Factor. — Evidence of defendant's good reputation was not "substantial, uncontradicted and manifestly credible," so as to

compel the trial court to find it as a mitigating factor. *State v. Clark*, 314 N.C. 638, 336 S.E.2d 83 (1985).

Evidence held not sufficient to mandate a finding that defendant was of good character. *State v. Kuplen*, 316 N.C. 387, 343 S.E.2d 793 (1986).

K. Minor Defendant.

Seventeen Year Old Is Aware That Murder Wrongful. — A person at 17 years of age should be as well aware as any person of the wrong involved in the commission of murder, and the court did not abuse its discretion in failing to find defendant's age a mitigating factor. *State v. Moore*, 78 N.C. App. 77, 337 S.E.2d 66 (1985), modified on other grounds and *aff'd*, 317 N.C. 275, 345 S.E.2d 217 (1986).

L. Honorable Discharge.

Failure to Consider Military Service Held Error. — The failure of the trial judge to consider the defendant's honorable military service as a mitigating factor constituted error requiring that defendant be afforded a new sentencing hearing. *State v. Heath*, 77 N.C. App. 264, 335 S.E.2d 350 (1985), *rev'd* on other grounds, 316 N.C. 337, 341 S.E.2d 565 (1986).

The trial judge's refusal to even consider evidence of the defendant's honorable discharge from military service without documentary proof was error. *State v. Hanes*, 77 N.C. App. 222, 334 S.E.2d 444 (1985).

M. Nonstatutory Factors.

Rendering Aid to Victim. — While actions of defendant in rendering aid to his victim should be encouraged and legislative consideration of making such circumstances a statutory mitigating factor would be appropriate, the Supreme Court would decline to reach this goal under the guise of judicial construction. *State v. Blackstock*, 314 N.C. 232, 333 S.E.2d 245 (1985).

Insubstantial Loss to Victim. — The trial court did not err in failing to find, as a nonstatutory mitigating factor on sentencing defendant on convictions of felonious breaking or entering and felonious larceny, that victim suffered only insubstantial loss, where victim's loss was insubstantial merely because the police stopped defendant's accomplice in the middle of the larceny. *State*

v. Litchford, 78 N.C. App. 722, 338 S.E.2d 575 (1986).

Good Work Record. — This section does not require the judge to find non-statutory factors that the evidence establishes, but merely permits him to do so; thus, when the judge declined to find as a factor in mitigation that the defendant had a good work record, he was exercising his discretion, for which there is no appellate relief in the absence of abuse. *State v. Elliott*, 77 N.C. App. 647, 335 S.E.2d 774 (1985).

Drug addiction is not per se a statutorily enumerated mitigating factor. It could perhaps be found to mitigate the offense, either under the rubric of the enumerated factors, or otherwise as being reasonably related to the purposes of sentencing. *State v. Bynum*, 65 N.C. App. 813, 310 S.E.2d 388, *cert. denied*, 311 N.C. 404, 319 S.E.2d 275 (1984).

Although defendant's evidence could justify a finding that his crimes were committed to support his expensive drug habit, where he presented no evidence that would compel the conclusion that his culpability for the offense committed was significantly reduced because of his drug addiction, there was no error in the sentencing judge's refusal to find defendant's drug addiction a factor in mitigation of his sentence. *State v. Arnette*, — N.C. App. —, 355 S.E.2d 498 (1987).

The sentencing judge's refusal to consider that defendant was a long-term drug addict, under the influence of drugs, and stealing to support his habit as a non-statutory mitigating factor did not constitute an abuse of discretion. *State v. Arnette*, — N.C. App. —, 355 S.E.2d 498 (1987).

The election not to testify so as to avoid giving perjured testimony may not be considered as a mitigating factor. *State v. Edwards*, 310 N.C. 142, 310 S.E.2d 610 (1984).

Behavior Pending Resentencing Hearing. — A defendant's good conduct while incarcerated during the period from his conviction until the time of his resentencing hearing may, in the discretion of the trial judge, be found as a non-statutory mitigating factor under the Fair Sentencing Act. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986).

Prevention of Jailbreak. — The trial court did not err in failing to find defendant's possible prevention of a jailbreak as a mitigating factor. *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

IV. FINDINGS OF COURT.

Findings Must Be Made Where Sentence Imposed Is Longer Than Presumed Sentence. — If the judge imposes a prison sentence longer than the presumed sentence listed in subsection (f) of this section for the class of felony of which the defendant is adjudged guilty, the judge must first find that the factors in aggravation outweigh the factors in mitigation. He must also specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence. *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983).

Trial judge must impose the statutorily set presumptive sentence unless he properly makes written findings of aggravating or mitigating factors and then finds that one set of factors outweighs the other. *State v. Teague*, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

The trial judge, in imposing a sentence under the Fair Sentencing Act, is required, first, to consider each of the aggravating and mitigating factors listed in this section. And, when the trial judge imposes a term that differs from the presumptive term, the trial court must list in the record all the factors in aggravation and mitigation that he finds proved by preponderance of the evidence. *State v. Wood*, 61 N.C. App. 446, 300 S.E.2d 903, cert. denied, 308 N.C. 547, 302 S.E.2d 884 (1983).

But Findings Are Not Required Where Judge Imposes Presumptive Term. — Where the judge imposed presumptive terms for all offenses of which defendant was convicted, he had no duty to make findings regarding aggravating and mitigating factors. *State v. Teasley*, 82 N.C. App. 150, 346 S.E.2d 227 (1986), cert. denied and appeal dismissed, 318 N.C. 701, 351 S.E.2d 759 (1987).

Where defendant, upon conviction of a Class H felony, was sentenced to the presumptive term of three years, the trial judge was not required to find aggravating or mitigating factors. *State v. Newell*, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

Where defendant was given the presumptive sentence, the trial court was not required to make findings in aggravation and mitigation. *State v. Blake*, 83 N.C. App. 77, 349 S.E.2d 78 (1986), petition for discretionary review as to additional issues denied, 318 N.C. 697, 351 S.E.2d 751 (1987).

Judge is required to find factors

proved by uncontradicted and manifestly credible evidence. *State v. Potts*, 65 N.C. App. 101, 308 S.E.2d 754 (1983), cert. denied, 311 N.C. 406, 319 S.E.2d 278 (1984).

Failure to Do So Is Error. — In order to give proper effect to the Fair Sentencing Act, the appellate court must find the sentencing judge in error if he fails to find a statutory factor when evidence of its existence is both uncontradicted and manifestly credible. *State v. Taylor*, 309 N.C. 570, 308 S.E.2d 302 (1983); *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

Record Must Support Factors Found by Preponderance of Evidence. — This section does not require a specific fact finding on each factor to be considered in sentencing. All that is necessary is that the record support the factor by a "preponderance of the evidence." *State v. Abee*, 60 N.C. App. 99, 298 S.E.2d 184 (1982), modified on other grounds and aff'd, 308 N.C. 379, 302 S.E.2d 230 (1983).

The sentencing judge is required to make written findings in aggravation and mitigation, which findings must be proved by a preponderance of the evidence; that is, by the greater weight of the evidence. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Separate Findings Required for Each Offense. — In every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

Separate findings must be made for each offense, even if the cases are consolidated for hearing. *State v. Ledford*, 315 N.C. 599, 340 S.E.2d 309 (1986).

In cases where offenses are not consolidated for judgment, where the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately in determining which aggravating or mitigating factors pertain to which offenses. However, if the offenses are consolidated for judgment, this separate treatment is not necessary.

State v. Graves, 83 N.C. App. 126, 349 S.E.2d 320 (1986).

Failure to Make Findings on Lesser Offenses Consolidated for Judgment. — When cases are consolidated for judgment and the trial judge finds aggravating and mitigating factors as to the most serious offense, but fails to make such findings as to the lesser consolidated offenses, the defendant is not prejudiced, so long as the sentence given does not exceed the maximum sentence permissible for the most serious offense. State v. Miller, 316 N.C. 273, 341 S.E.2d 531 (1986).

Aggravating and Mitigating Factors Form Sheets on Multiple Offenses. — Where in sentencing the defendant to a term of imprisonment for violations of both §§ 14-54 and 14-72 which exceeded the presumptive term, the trial judge made and listed findings which supported the validity of both judgments under subsection (b) of this section, and in passing judgment on the defendant the court gave separate consideration to each offense and the aggravating and mitigating factors found in each instance, the fact that only one and not two aggravating and mitigating factors form sheets were signed and put in the file, as the judge obviously intended, did not require that defendant be resentenced. State v. Hall, 81 N.C. App. 650, 344 S.E.2d 811, petition for cert. dismissed as moot, 318 N.C. 510, 349 S.E.2d 868 (1986).

Finding on Weight of Factors Not Required Where Only Aggravating Factors Are Found. — Since only aggravating factors were found, it would have been an exercise in futility to require the trial judge to make a specific finding that those factors outweighed nonexistent mitigating factors. State v. Freeman, 313 N.C. 539, 330 S.E.2d 465 (1985).

Weight Attached to Particular Factor Need Not Be Justified. — While the trial judge is required to justify a sentence which deviates from a presumptive term to the extent that he must make findings in aggravation and mitigation properly supported by the evidence and in accordance with the Act, a trial judge need not justify the weight he attaches to any factor. He may properly determine that one factor in aggravation outweighs more than one factor in mitigation and vice versa. State v. Lane, 77 N.C. App. 741, 336 S.E.2d 410 (1985).

Factors Rejected Need Not Be Set

Forth in Judgment. — Although the trial judge is required to consider all of the statutory aggravating and mitigating factors, he is only required to set out in the judgment the factors that he determines by the preponderance of the evidence are present. He is not required to list in the judgment statutory factors that he considered and rejected as being unsupported by the preponderance of the evidence. State v. Davis, 58 N.C. App. 330, 293 S.E.2d 658, cert. denied, 306 N.C. 745, 295 S.E.2d 482 (1982).

Proceedings Do Not Involve Finding of Elemental Facts. — The proceedings under the Fair Sentencing Act do not involve the finding of elemental facts beyond a reasonable doubt in the nature of a guilt or innocence trial. State v. Jones, 314 N.C. 644, 336 S.E.2d 385 (1985).

On resentencing, the trial court must make a new and fresh determination of the sufficiency of the evidence underlying each factor in aggravation and mitigation, including those factors previously found and affirmed by the appellate court. State v. Daye, 78 N.C. App. 753, 338 S.E.2d 557, aff'd per curiam, 318 N.C. 502, 349 S.E.2d 576 (1986).

Finding of Different Factors at Later Hearing. — In proceedings under the Fair Sentencing Act, the principles of double jeopardy do not bar the finding of aggravating and mitigating factors different from those found at an earlier sentencing hearing. State v. Jones, 314 N.C. 644, 336 S.E.2d 385 (1985).

At a de novo resentencing hearing brought about by a defendant, the trial court may find altogether new aggravating and mitigating factors, without regard to the findings in the prior sentencing hearings. State v. Daye, 78 N.C. App. 753, 338 S.E.2d 557, aff'd per curiam, 318 N.C. 502, 349 S.E.2d 576 (1986).

A resentencing hearing is a de novo proceeding at which the trial judge may find aggravating and mitigating factors without regard to the findings made at the prior sentencing hearing. State v. Swimm, 316 N.C. 24, 340 S.E.2d 65 (1986).

Finding in Earlier Hearing Not Law of Case. — The trial court erred during resentencing by treating the prior finding in aggravation that defendant was a danger to others, found in the original sentencing hearing and approved on appeal, as the law of the case.

State v. Daye, 78 N.C. App. 753, 338 S.E.2d 557, aff'd per curiam, 318 N.C. 502, 349 S.E.2d 576 (1986).

But May Be Binding Precedent. — If an appellate court has squarely ruled that certain evidence does not support a certain factor in aggravation or mitigation, and the identical evidence is offered at the resentencing hearing to support the same factor, the trial court on resentencing is bound by the appellate ruling, not because it is the law of the case, but because it is binding precedent directly on point. This is not a limitation on the de novo nature of the resentencing proceeding; rather, it is a recognition that the trial court's rulings are always governed by applicable appellate decisions. State v. Daye, 78 N.C. App. 753, 338 S.E.2d 557, aff'd per curiam, 318 N.C. 502, 349 S.E.2d 576 (1986).

V. DISCRETION OF COURT IN WEIGHING FACTORS AND IMPOSING SENTENCE.

This Article did not remove, nor intend to remove, all discretion from the sentencing judge. Judges still have discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within their sound discretion. State v. Davis, 58 N.C. App. 330, 293 S.E.2d 658, cert. denied, 306 N.C. 745, 295 S.E.2d 482 (1982); State v. Ahearn, 59 N.C. App. 44, 295 S.E.2d 621 (1982), rev'd on other grounds, 307 N.C. 584, 300 S.E.2d 689 (1983); State v. Massey, 59 N.C. App. 704, 298 S.E.2d 63 (1982); State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984); State v. Parker, 315 N.C. 249, 337 S.E.2d 497 (1985).

This Article did not remove all discretion from trial judges. It is necessary that trial judges be permitted great latitude in ascertaining the true existence of aggravating and mitigating circumstances. State v. Graham, 309 N.C. 587, 308 S.E.2d 311 (1983).

The Fair Sentencing Act was not intended to remove all discretion from the trial judges. The trial judge should be permitted wide latitude in arriving at the truth as to the existence of aggravating and mitigating circumstances, for it is only he who observes the demeanor of the witnesses and hears the testimony. State v. Thompson, 310 N.C. 209, 311 S.E.2d 866 (1984).

Weighing of Factors. — The weight to be given aggravating and mitigating

factors is clearly within the sound discretion of the trial judge, whose decision will not be disturbed absent an abuse of that discretion. State v. Teeter, — N.C. App. —, 355 S.E.2d 804 (1987).

Weighing Factors Is Not Simple Matter of Mathematics. — The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another in a particular case. State v. Ahearn, 59 N.C. App. 44, 295 S.E.2d 621 (1982), rev'd on other grounds, 307 N.C. 584, 300 S.E.2d 689 (1983); State v. Morris, 59 N.C. App. 157, 296 S.E.2d 309 (1982), cert. denied and appeal dismissed, 307 N.C. 471, 299 S.E.2d 227 (1983); State v. Goforth, 59 N.C. App. 504, 297 S.E.2d 128 (1982), cert. granted for purposes of resentencing, 307 N.C. 699, 307 S.E.2d 162 (1983); State v. Jones, 59 N.C. App. 472, 297 S.E.2d 132 (1982); State v. Thobourne, 59 N.C. App. 584, 297 S.E.2d 774 (1982); State v. Massey, 59 N.C. App. 704, 298 S.E.2d 63 (1982).

The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. For example, three factors of one kind do not automatically and of necessity outweigh one factor of another kind. The number of factors found is only one consideration in determining which factors outweigh others. State v. Davis, 58 N.C. App. 330, 293 S.E.2d 658, cert. denied, 306 N.C. 745, 295 S.E.2d 482 (1982); State v. Watson, 311 N.C. 252, 316 S.E.2d 293 (1984).

The discretionary task of weighing mitigating and aggravating factors is not a simple matter of mathematics. The number of factors found is only one consideration in determining which factors outweigh others. The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. State v. Abee, 60 N.C. App. 99, 298 S.E.2d 184 (1982), modified on other grounds and aff'd, 308 N.C. 379, 302 S.E.2d 230 (1983).

As subsection (a) of this section allows, the court is free to emphasize one factor more than another, as the discre-

tionary weighing of mitigating and aggravating factors does not lend itself to a simple mathematical formula. *State v. Sandlin*, 61 N.C. App. 421, 300 S.E.2d 893, cert. denied, 464 U.S. 995, 104 S. Ct. 491, 78 L. Ed. 2d 685, cert. denied, 308 N.C. 680, 304 S.E.2d 760 (1983).

But Is within the Discretion of the Sentencing Judge. — Weighing of aggravating and mitigating factors is within the sound discretion of the sentencing judge. *State v. Goforth*, 59 N.C. App. 504, 297 S.E.2d 128 (1982), cert. granted for purposes of resentencing, 307 N.C. 699, 307 S.E.2d 162 (1983); *State v. Taylor*, 74 N.C. App. 326, 328 S.E.2d 27, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985); *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

The balancing of the properly found factors in aggravation and mitigation is left to the sound discretion of the trial judge. *State v. Teague*, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

Weight attached to particular aggravating or mitigating circumstances in a case is within the discretion of the trial judge. *State v. Salters*, 65 N.C. App. 31, 308 S.E.2d 512 (1983), cert. denied, 310 N.C. 479, 312 S.E.2d 889 (1984); *State v. Upright*, 72 N.C. App. 94, 323 S.E.2d 479 (1984), cert. denied, 313 N.C. 610, 332 S.E.2d 82 (1985).

Except for maximum sentence limitations in § 14-1.1, the severity of a sentence imposed pursuant to this Article, insofar as it is based on a weighing of aggravating and mitigating factors, is within the discretion of the judge. *State v. Salters*, 65 N.C. App. 31, 308 S.E.2d 512 (1983), cert. denied, 310 N.C. 479, 312 S.E.2d 889 (1984).

As Is Decision to Impose Sentence Above Presumptive Term. — Upon a finding by the preponderance of the evidence that aggravating factors outweigh mitigating factors, the question of whether to increase the sentence above the presumptive term, and if so, to what extent remains within the trial judge's discretion. *State v. Davis*, 58 N.C. App. 330, 293 S.E.2d 658, cert. denied, 306 N.C. 745, 295 S.E.2d 482 (1982); *State v. Watson*, 311 N.C. 252, 316 S.E.2d 293 (1984).

Once the trial judge determines that the aggravating factors outweigh the mitigating factors, the extent by which the sentence exceeds the presumptive sentence is within his discretion, so long as it does not exceed the maximum punishment set by the legislature. *State v.*

Freeman, 313 N.C. 539, 330 S.E.2d 465 (1985).

Or Sentence Below Presumptive Term. — Upon a finding of one or more mitigating factors and no aggravating factors, the question of whether to reduce the sentence below the presumptive term, and if so, to what extent, is within the trial court's discretion. *State v. Cain*, 79 N.C. App. 35, 338 S.E.2d 898, cert. denied, 316 N.C. 380, 342 S.E.2d 899 (1986).

Finding of an equal number of aggravating and mitigating factors is not determinative. The finding that the sole factor in aggravation outweighed the sole factor in mitigation was in the court's discretion. *State v. Massey*, 59 N.C. App. 704, 298 S.E.2d 63 (1982).

Court May Emphasize One Factor More Than Another. — Although the court is required to consider all statutory factors to some degree, it may very properly emphasize one factor more than another in a particular case. *State v. Davis*, 58 N.C. App. 330, 293 S.E.2d 658, cert. denied, 306 N.C. 745, 295 S.E.2d 482 (1982).

A trial court may properly determine that one factor in aggravation outweighs more than one factor in mitigation and vice versa. *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986).

This section does not remove all discretion in sentencing from trial judges. Fact that the number of mitigating factors are greater than the number of aggravating ones does not preclude the trial judge from finding that the aggravating factors outweigh the mitigating ones. *State v. Abee*, 60 N.C. App. 99, 298 S.E.2d 184 (1982), modified on other grounds and aff'd, 308 N.C. 379, 302 S.E.2d 230 (1983).

Single Aggravating Factor May Support Sentence Greater Than Presumptive Term. — A finding of a single factor in aggravation supported by a preponderance of evidence is sufficient to support a sentence greater than the presumptive term. *State v. Upright*, 72 N.C. App. 94, 323 S.E.2d 479 (1984), cert. denied, 313 N.C. 513, 329 S.E.2d 400, cert. denied, 313 N.C. 610, 332 S.E.2d 82 (1985).

Balance Struck by Judge Not Disturbed if Supported by Evidence. — The balance struck by the trial judge in considering circumstances in aggravation and mitigation will not be disturbed if there is support in the record for his

determination. *State v. Davis*, 58 N.C. App. 330, 293 S.E.2d 658, cert. denied, 306 N.C. 745, 295 S.E.2d 482 (1982); *State v. Ahearn*, 59 N.C. App. 44, 295 S.E.2d 621 (1982), rev'd on other grounds, 307 N.C. 584, 300 S.E.2d 689 (1983); *State v. Morris*, 59 N.C. App. 157, 296 S.E.2d 309 (1982), cert. denied and appeal dismissed, 307 N.C. 471, 299 S.E.2d 227 (1983); *State v. Goforth*, 59 N.C. App. 504, 297 S.E.2d 128 (1982), cert. granted for purposes of resentencing, 307 N.C. 699, 307 S.E.2d 162 (1983); *State v. Thobourne*, 59 N.C. App. 584, 297 S.E.2d 774 (1982); *State v. Massey*, 59 N.C. App. 704, 298 S.E.2d 63 (1982); *State v. Thompson*, 62 N.C. App. 38, 302 S.E.2d 310 (1983), aff'd, 310 N.C. 209, 311 S.E.2d 806 (1984); *State v. Baucom*, 66 N.C. App. 298, 311 S.E.2d 73 (1984); *State v. Mitchell*, 67 N.C. App. 549, 313 S.E.2d 201 (1984); *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985); *State v. Penley*, 318 N.C. 30, 347 S.E.2d 783 (1986).

Trial judges continue to have great discretion with respect to balancing factors found in aggravation against factors found in mitigation, and this balancing process, if correctly carried out, will not be disturbed on appeal. *State v. Hinnant*, 65 N.C. App. 130, 308 S.E.2d 732 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

Lack of Rational Basis Is Abuse of Discretion. — When there is no rational basis for the manner in which the aggravating and mitigating factors are weighed by the sentencing judge, his decision will amount to an abuse of discretion. *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985).

VI. SENTENCING, GENERALLY.

This section provides for three methods of sentencing. These methods are in the disjunctive. The statute makes no provision for finding aggravating or mitigating factors if two or more crimes are consolidated for judgment, and it was therefore error for the trial court to enhance presumptive sentence by more than the maximum for any of the charges. *State v. Ransom*, 74 N.C. App. 716, 329 S.E.2d 673 (1985), aff'd, 80 N.C. 711, 343 S.E.2d 232 (1986).

The Fair Sentencing Act has not taken away the trial judge's discretion to impose either consecutive or concurrent sentences. *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985).

Constitutionality of Consecutive Sentences. — The imposition of consecutive sentences for conspiracy to commit armed robbery, first-degree murder, armed robbery, second-degree burglary, and breaking or entering and larceny does not violate any constitutional proportionality requirement. *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986).

When Sentence Other Than Presumptive Sentence May Be Imposed.

— Under this section, the judge may impose a sentence other than the presumptive sentence if he finds aggravating or mitigating factors. He may also impose a sentence other than the presumptive sentence pursuant to a plea bargain. The third way he may impose a sentence other than a presumptive sentence is by consolidating two or more charges for judgment. In addition, the judge may, without finding aggravating or mitigating factors, impose a sentence other than the presumptive sentence so long as the sentence complies with the three requirements set forth in this section, including the requirements that the sentence imposed is not for a term longer than the maximum term for any of the charges consolidated. *State v. Ransom*, 74 N.C. App. 716, 329 S.E.2d 673 (1985), aff'd, 80 N.C. 711, 343 S.E.2d 232 (1986).

Presumptive Sentence Set by Criminal Statute. — In cases in which a statute mandates that an offender be punished as a felon of one of the classifications of subsection (f) of this section, but sets a minimum sentence greater than the presumptive sentence established in subsection (f), the minimum sentence set out in the criminal statute becomes the presumptive sentence for purposes of sentencing under the Fair Sentencing Act. *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

Departure from Presumptive Sentence through Weighing of Factors. — North Carolina's Fair Sentencing Act specifies that the presumptive sentence for a Class H felony is three years. The court, however, can depart from the presumptive sentence by weighing mitigating and aggravating factors that are proved by a preponderance of the evidence. If aggravating factors outweigh mitigating factors, the court may impose punishment up to the statutory maximum. Conversely, if mitigating factors preponderate, the court may impose a sentence less than the presumptive sentence. The court must explain its reasons for enhancing or reducing a sen-

tence. *United States v. Price*, 812 F.2d 174 (4th Cir. 1987).

Effect of § 14-87. — The legislature clearly intended the provisions of § 14-87(d), relating to a minimum sentence for persons convicted of robbery with firearms or other dangerous weapons, to control over the conflicting provisions of this Article. *State v. Leeper*, 59 N.C. App. 199, 296 S.E.2d 7, cert. denied, 307 N.C. 272, 299 S.E.2d 218 (1982).

Presumptive Sentence for Armed Robbery. — Fourteen years is not only the minimum, but also the presumptive, sentence in robbery with firearm cases. *State v. Morris*, 59 N.C. App. 157, 296 S.E.2d 309, cert. denied and appeal dismissed, 307 N.C. 471, 299 S.E.2d 227 (1983).

The 14-year sentence for armed robbery specified in § 14-87(d) is a minimum which may not be reduced under this Article, except by credit for good behavior. *State v. Leeper*, 59 N.C. App. 199, 296 S.E.2d 7, cert. denied, 307 N.C. 272, 299 S.E.2d 218 (1982).

Presumptive Sentence for Second Degree Murder. — In this State murder in the second degree is a Class C felony, and therefore the judge sentencing a defendant who is found guilty of such a crime must impose a 15-year term of imprisonment unless aggravating or mitigating factors merit imposition of a longer or shorter term. *State v. Melton*, 307 N.C. 370, 298 S.E.2d 673 (1983).

Burden of Showing Invalidity of Sentence in Excess of Presumptive Term. — Defendant sentenced to a term in excess of the presumptive sentence bears the burden of showing that the sentence imposed is invalid due to an abuse of discretion on the part of the trial judge or on the basis of procedural conduct or other circumstances prejudicial to him. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986).

A preponderance of the evidence is sufficient to prove an aggravating factor supporting a sentence in excess of the presumptive term. *State v. Mann*, 317 N.C. 164, 345 S.E.2d 365 (1986).

Sentence in Excess of Presumptive Term Upheld. — Evidence that assault victim was beaten, shot in the back of the head, driven over by a car, and left on the highway with his leg caught up underneath the car held to justify a sentence in excess of the presumptive term. *State v. Poole*, 82 N.C. App. 117, 345

S.E.2d 466 (1986), cert. denied, 318 N.C. 700, 351 S.E.2d 757 (1987).

It was not an abuse of discretion for the trial judge to impose a sentence in excess of the presumptive term for second degree murder merely because only two aggravating factors (prior conviction and premeditation and deliberation) were found as compared to seven mitigating factors. *State v. Carter*, 318 N.C. 487, 349 S.E.2d 580 (1986).

Sentence Other Than Presumptive One Upheld. — The trial judge did not err where he consolidated defendant's offenses for sentencing, made findings of factors in aggravation and mitigation, and imposed a sentence other than the presumptive sentence, but which did not exceed the maximum term for the most serious felony so consolidated. *State v. Phillips*, — N.C. App. —, 352 S.E.2d 273 (1987).

VII. APPELLATE REVIEW.

Under the Fair Sentencing Act, the appellate courts have more supervision over sentencing judgments of the trial divisions than they did before that Act. *State v. Wortham*, 318 N.C. 669, 351 S.E.2d 294 (1987).

The Fair Sentencing Act does not allow appeal of a presumptive sentence as of right. *State v. Cain*, 79 N.C. App. 35, 338 S.E.2d 898, cert. denied, 316 N.C. 380, 342 S.E.2d 899 (1986).

Appeal of Right from Sentence in Excess of Presumptive Term. — When a convicted felon is given a sentence in excess of a presumptive sentence, he may appeal as a matter of right, and the only question before the appellate court on such an appeal is whether the sentence is supported by evidence introduced at trial and the sentencing hearing. *State v. Teague*, 60 N.C. App. 755, 300 S.E.2d 7 (1983).

Deletion of Aggravating Factor Following Notice of Appeal. — Trial judge has authority to change the judgment, so as to delete a factor found in aggravation, after it has been entered and after defendant has given notice of appeal, where the amendment was made during the session, since all orders and judgments are in fieri during the session and may be amended or vacated by the court during the session, even though notice of appeal has been entered. *State v. Davis*, 58 N.C. App. 330, 293 S.E.2d 658, cert. denied, 306 N.C. 745, 295 S.E.2d 482 (1982).

Scope of Review. — In sentencing

review, the Court of Appeals looks not for errors in judgment, but only for errors of law. *State v. Hinnant*, 65 N.C. App. 130, 308 S.E.2d 732 (1983), cert. denied, 310 N.C. 310, 312 S.E.2d 653 (1984).

A ruling committed to a trial judge's discretion will be upset only upon a showing that it could not have been the result of a reasoned decision. *State v. Cameron*, 314 N.C. 516, 335 S.E.2d 9 (1985).

Remand for New Hearing. — Because it must be assumed that every factor in aggravation measured against every factor in mitigation, with concomitant weight attached to each, contributes to the severity of the sentence in every case in which it is found that the judge erred in a finding or findings in aggravation and imposed a sentence beyond the presumptive term, such case must be remanded for a new sentencing hearing. *State v. Chatman*, 308 N.C. 169, 301 S.E.2d 71 (1983).

When a trial judge errs in making a finding in aggravation and also imposes a prison term in excess of the presumptive sentence, the entire case must be remanded for a new sentencing hearing. *State v. Thompson*, 62 N.C. App. 38, 302 S.E.2d 310 (1983), *aff'd*, 310 N.C. 209, 311 S.E.2d 886 (1984); *State v. Isom*, 65 N.C. App. 223, 309 S.E.2d 283 (1983); *State v. Bates*, 76 N.C. App. 676, 334 S.E.2d 73 (1985); *State v. Hayes*, 314 N.C. 460, 334 S.E.2d 741 (1985).

Where the trial judge was clearly acting under a misapprehension of the law when he determined that the penalty for first degree burglary, a Class C felony,

was a mandatory life sentence, the trial judge could not have exercised his discretion in passing sentence, and it would be necessary to remand defendant's burglary conviction for a new sentencing hearing. *State v. Long*, 316 N.C. 60, 340 S.E.2d 392 (1986).

Whenever there is error in a sentencing judge's failure to find a statutory mitigating or aggravating circumstance and a sentence in excess of the presumptive term is imposed, the matter must be remanded for a new sentencing hearing. *State v. Daniel*, — N.C. —, 354 S.E.2d 216 (1987).

Where an aggravating factor is incorrect, the trial judge cannot properly balance the aggravating and mitigating factors, and the case must be remanded for resentencing. *State v. Taylor*, 74 N.C. App. 326, 328 S.E.2d 27, cert. denied, 314 N.C. 547, 335 S.E.2d 319 (1985).

When the trial court erroneously finds any aggravating factor to exist, the defendant is entitled to a new sentencing hearing. *State v. Green*, 309 N.C. 623, 308 S.E.2d 326 (1983).

Harmless Error in Factors Found. — Where defendant's sentence of 10 years imprisonment for four consolidated convictions of first degree kidnapping was less than the presumptive sentence for that crime, and trial judge found no mitigating factors, any error in the aggravating factors found was harmless so far as defendant's sentence for kidnapping was concerned. *State v. Long*, 316 N.C. 60, 340 S.E.2d 392 (1986).

§ 15A-1340.7. Service of term of imprisonment; credit for good behavior; prisoner conduct rules; informing prisoner of release date; reentry parole and committed youthful offender parole.

Legal Periodicals. — For survey of 1982 law on Criminal Procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

Judges still have discretion to increase or reduce sentences from the presumptive term upon findings of aggravating or mitigating factors, the weighing of which is a matter within

their sound discretion. The balance struck by the trial judge will not be disturbed if there is support in the record for his determination. *State v. Stone*, 71 N.C. App. 417, 322 S.E.2d 413 (1984).

Conduct Prior to Original Trial and Sentencing Hearing. — An inmate's good behavior prior to his original trial and/or sentencing hearing may be found as a nonstatutory mitigating factor, and his bad conduct during the same time frame may be found as a nonstatutory aggravating factor. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986).

Conduct Between Conviction and Presentencing. — As § 15A-1335 prohibits the trial court from resentencing a defendant to a term of imprisonment greater than the prior sentence less the portion of the prior sentence previously served, a trial judge in North Carolina may not consider a defendant's bad conduct during the period between his conviction and the resentencing hearing to increase his sentence. However, bad conduct may be found by the trial judge as a nonstatutory aggravating factor to be utilized by the judge in deciding the sentence to be imposed, so long as the new sentence is no more severe than the orig-

inal one. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986).

A defendant's good conduct while incarcerated during the period from his conviction until the time of his resentencing hearing may, in the discretion of the trial judge, be found as a nonstatutory mitigating factor under the Fair Sentencing Act. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986).

Trial judge's remarks concerning the effect of "good time" and "gain time" were not an expression of dissatisfaction with the length of time convicted criminals must serve in prison, but were made in an effort to respond to defense counsel's impassioned argument concerning the fact that the defendant would be required to serve other sentences totalling four years at the expiration of the sentence at issue; thus, it could not be said from such remarks that the trial court was using the sentencing process to thwart the Fair Sentencing Act. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986).

ARTICLE 82.

Probation.

§ 15A-1341. Probation generally.

CASE NOTES

Probation or suspension of sentence, etc. —

In accord with main volume. See *State v. Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986).

Court has inherent power, etc. —

The adoption of this Article did not affect the inherent power of the court to suspend sentences in criminal cases upon reasonable and just conditions. This Article establishes cumulative and concurrent procedures which supplement rather than limit the inherent sentencing power of the court. This Article only provides the courts with additional authority concurrent with the inherent power of the court. *State v. Stallings*, 316 N.C. 535, 342 S.E.2d 519 (1986).

And May Dictate Conditions of Probation. — Because a court has the inherent power to suspend a judgment upon reasonable and just conditions, the trial court need not rely on its additional statutory authority to dictate the condi-

tions of probation. *State v. Stallings*, 316 N.C. 535, 342 S.E.2d 519 (1986).

Due Process to Be Afforded Before Probation Is Revoked. — Under subsection (c) of this section, a defendant is given the election between imprisonment and probation in the first instance; and once he chooses probation, § 15A-1345 guarantees full due process before there can be a revocation of probation and a resulting prison sentence. *State v. Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986).

Evidence in Probation Revocation Proceedings. — The trial court, in probation revocation proceedings, is not bound by strict rules of evidence. *State v. Darrow*, 83 N.C. App. 647, 351 S.E.2d 138 (1986).

Standard of Proof in Probation Revocation Proceedings. — In probation revocation proceedings, grounds for revocation need not be proven beyond a reasonable doubt. Instead, the court may

allow revocation of probation on evidence which is sufficient to satisfy the court, in its discretion, that defendant has violated a valid condition of his probation. *State v. Darrow*, 83 N.C. App. 647, 351 S.E.2d 138 (1986).

Probation Revocation Upheld. — Trial court's finding that the State proved, by a preponderance of the evidence, that defendant made an obscene telephone call to burglary victim on two occasions supported conclusion that defendant had violated the terms of the

agreement he executed with the State pursuant to this section, whereby he would participate in the felony diversion program and be placed on probation in exchange for deferral of prosecution on the burglary charge and would have certain restrictions, one of which was that he could not contact or harass victim, and that his removal from the felony diversion program was for just cause. *State v. Darrow*, 83 N.C. App. 647, 351 S.E.2d 138 (1986).

§ 15A-1342. Incidents of probation.

(a) Period. — The court may place a convicted offender on probation for a maximum of five years. The court may place a defendant as to whom prosecution has been deferred on probation for a maximum of two years. The probation remains conditional and subject to revocation during the period of probation imposed, unless terminated as provided in subsection (b) or G.S. 15A-1341(c).

The court with the consent of the defendant may extend the period of probation beyond five years (i) for the purpose of allowing the defendant to complete a program of restitution, or (ii) to allow the defendant to continue medical or psychiatric treatment ordered as a condition of the probation. The period of extension shall not exceed three years beyond the original period of probation. The special extension authorized herein may be ordered only in the last six months of the probation term.

(1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 6, 7; 1981, c. 377, ss. 4-6; 1983, c. 435, s. 5.1; c. 561, s. 7; 1985 (Reg. Sess., 1986), c. 960, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amend-

ment, effective July 10, 1986, and applicable to persons placed on probation on or after July 10, 1986, and to persons on probation on July 10, 1986, added the second paragraph of subsection (a).

CASE NOTES

Defendant may not raise an initial objection to a condition of probation on appeal, but must first object no later than the revocation hearing. *State v. Tozzi*, — N.C. App. —, 353 S.E.2d 250 (1987).

Where the record on appeal contained

no written or oral objections by defendant raising the issue of a defect in the original judgment at the revocation hearing, defendant waived this issue on appeal. *State v. Tozzi*, — N.C. App. —, 353 S.E.2d 250 (1987).

§ 15A-1343. Conditions of probation.

(b) Regular Conditions. — As regular conditions of probation, a defendant must:

- (1) Commit no criminal offense in any jurisdiction.
- (2) Remain within the jurisdiction of the court unless granted written permission to leave by the court or his probation officer.
- (3) Report as directed by the court or his probation officer to the officer at reasonable times and places and in a reasonable manner, permit the officer to visit him at reasonable times, answer all reasonable inquiries by the officer and obtain prior approval from the officer for, and notify the officer of, any change in address or employment.
- (4) Satisfy child support and other family obligations as required by the court.
- (5) Possess no firearm, explosive device or other deadly weapon listed in G.S. 14-269 without the written permission of the court.
- (6) Pay a supervision fee as specified in subsection (c1).
- (7) Remain gainfully and suitably employed or faithfully pursue a course of study or of vocational training that will equip him for suitable employment.
- (8) Notify the probation officer if he fails to obtain or retain satisfactory employment.
- (9) Pay the costs of court, any fine ordered by the court, and make restitution or reparation as provided in subsection (d).
- (10) Pay the State of North Carolina for the costs of appointed counsel, public defender, or appellate defender to represent him in the case(s) for which he was placed on probation.
- (11) At a time to be designated by his probation officer, visit with his probation officer a facility maintained by the Division of Prisons.

In addition to these regular conditions of probation, a defendant required to serve an active term of imprisonment as a condition of special probation pursuant to G.S. 15A-1344(e) or G.S. 15A-1351(a) shall, as additional regular conditions of probation, obey the rules and regulations of the Department of Correction governing the conduct of inmates while imprisoned and report to a probation officer in the State of North Carolina within 72 hours of his discharge from the active term of imprisonment.

Regular conditions of probation apply to each defendant placed on supervised probation unless the presiding judge specifically exempts the defendant from one or more of the conditions in open court and in the judgment of the court. It is not necessary for the presiding judge to state each regular condition of probation in open court, but the conditions must be set forth in the judgment of the court.

Defendants placed on unsupervised probation are subject to the provisions of this subsection, except that defendants placed on unsupervised probation are not subject to the regular conditions contained in subdivisions (2), (3), (6), (8), and (11).

(b1) Special Conditions. — In addition to the regular conditions of probation specified in subsection (b), the court may, as a condi-

tion of probation, require that during the probation the defendant comply with one or more of the following special conditions:

- (1) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.
- (2) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on probation.
- (3) Submit to imprisonment required for special probation under G.S. 15A-1351(a) or G.S. 15A-1344(e).
- (4) Surrender his driver's license to the clerk of superior court, and not operate a motor vehicle for a period specified by the court.
- (5) Compensate the Department of Natural Resources and Community Development or the North Carolina Wildlife Resources Commission, as the case may be, for the replacement costs of any marine and estuarine resources or any wildlife resources which were taken, injured, removed, harmfully altered, damaged or destroyed as a result of a criminal offense of which the defendant was convicted. If any investigation is required by officers or agents of the Department of Natural Resources and Community Development or the Wildlife Resources Commission in determining the extent of the destruction of resources involved, the court may include compensation of the agency for investigative costs as a condition of probation. This subdivision does not apply in any case governed by G.S. 143-215.3(a)(7).
- (6) Perform community or reparation service and pay any fee required by law or ordered by the court for participation in the community or reparation service program.
- (7) Submit at reasonable times to warrantless searches by a probation officer of his person and of his vehicle and premises while he is present, for purposes specified by the court and reasonably related to his probation supervision, but the probationer may not be required to submit to any other search that would otherwise be unlawful.
- (8) Not use, possess, or control any illegal drug or controlled substance unless it has been prescribed for him by a licensed physician and is in the original container with the prescription number affixed on it; not knowingly associate with any known or previously convicted users, possessors or sellers of any such illegal drugs or controlled substances; and not knowingly be present at or frequent any place where such illegal drugs or controlled substances are sold, kept, or used.
- (8a) Purchase the least expensive annual statewide license or combination of licenses to hunt, trap, or fish listed in G.S. 113-270.2, 113-270.3, 113-270.5, 113-271, 113-272, and 113-272.2 that would be required to engage lawfully in the specific activity or activities in which the defendant was engaged and which constitute the basis of the offense or offenses of which he was convicted.
- (9) If the offense is one in which there is evidence of physical, mental or sexual abuse of a minor, the court should encourage the minor and the minor's parents or custodians to

participate in rehabilitative treatment and may order the defendant to pay the cost of such treatment.

- (10) Satisfy any other conditions determined by the court to be reasonably related to his rehabilitation.

(c1) Supervision Fee. — Any person placed on supervised probation pursuant to subsection (a) shall pay a supervision fee of fifteen dollars (\$15.00) per month, unless exempted by the court. The court may exempt a person from paying the fee only for good cause and upon written motion of the person placed on supervised probation. No person shall be required to pay more than one supervision fee per month. The court may require that the fee be paid in advance or in a lump sum or sums, and a probation officer may require payment by such methods if he is authorized by subsection (g) to determine the payment schedule. Supervision fees must be paid to the clerk of court for the county in which the judgment was entered or the deferred prosecution agreement was filed. Fees collected under this subsection shall be transmitted to the State for deposit into the State's General Fund.

(d) Restitution as a Condition of Probation. — As a condition of probation, a defendant may be required to make restitution or reparation to an aggrieved party or parties who shall be named by the court for the damage or loss caused by the defendant arising out of the offense or offenses committed by the defendant. When restitution or reparation is a condition imposed, the court shall take into consideration the resources of the defendant, including all real and personal property owned by the defendant and the income derived from such property, his ability to earn, his obligation to support dependants, and such other matters as shall pertain to his ability to make restitution or reparation, but the court is not required to make findings of fact or conclusions of law on these matters when the sentence is imposed. The amount must be limited to that supported by the record, and the court may order partial restitution or reparation when it appears that the damage or loss caused by the offense or offenses is greater than that which the defendant is able to pay. An order providing for restitution or reparation shall in no way abridge the right of any aggrieved party to bring a civil action against the defendant for money damages arising out of the offense or offenses committed by the defendant, but any amount paid by the defendant under the terms of an order as provided herein shall be credited against any judgment rendered against the defendant in such civil action. As used herein, "restitution" shall mean (i) compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action, and (ii) reimbursement to the State for the total amount of a judgment authorized by G.S. 7A-455(b). As used herein, "reparation" shall include but not be limited to the performing of community services, volunteer work, or doing such other acts or things as shall aid the defendant in his rehabilitation. As used herein "aggrieved party" includes individuals, firms, corporations, associations, other organizations, and government agencies, whether federal, State or local, including the Crime Victims Compensation Fund established by G.S. 15B-23. Provided, that no government agency shall benefit by way of restitution except for particular damage or loss to it over and above its normal operating costs and except that the State may receive restitution for the total amount of a judgment authorized by G.S. 7A-455(b). A government agency may benefit by way of reparation

even though the agency was not a party to the crime provided that when reparation is ordered, community service work shall be rendered only after approval has been granted by the owner or person in charge of the property or premises where the work will be done. Provided further, that no third party shall benefit by way of restitution or reparation as a result of the liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant, but the liability of a third party to pay indemnity to an aggrieved party or any payment of indemnity actually made by a third party to an aggrieved party does not prohibit or limit in any way the power of the court to require the defendant to make complete and full restitution or reparation to the aggrieved party for the total amount of the damage or loss caused by the defendant. Restitution or reparation measures are ancillary remedies to promote rehabilitation of criminal offenders, to provide for compensation to victims of crime, and to reimburse the Crime Victims Compensation Fund established by G.S. 15B-23, and shall not be construed to be a fine or other punishment as provided for in the Constitution and laws of this State.

(e) **Costs of Court and Appointed Counsel.** — Unless the court finds there are extenuating circumstances, any person placed upon supervised or unsupervised probation under the terms set forth by the court shall, as a condition of probation, be required to pay all court costs and costs for appointed counsel or public defender in the case in which he was convicted. The court shall determine the amount due and the method of payment.

(1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 8-10; 1979, c. 662, s. 1; c. 801, s. 3; c. 830, s. 12; 1981, c. 530, ss. 1, 2; 1983, c. 135, s. 1; c. 561, ss. 1-6; c. 567, s. 2; c. 712, s. 1; 1983 (Reg. Sess., 1984), c. 972, ss. 1, 2; 1985, c. 474, ss. 1, 7, 8; 1985 (Reg. Sess., 1986), c. 859, ss. 1, 2; 1987, c. 282, s. 33; c. 397, s. 1; c. 579, ss. 1, 2; c. 598, s. 1; c. 819, s. 32; c. 830, s. 17.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. —

Session Laws 1983, cc. 135 and 561 amended subsection (e), but expired July 1, 1985. Subsection (e) is set out above as it read prior to the 1983 amendments.

Session Laws 1985 (Reg. Sess., 1986), c. 859, s. 1, provided: "G.S. 15A-1343(a)(6) is rewritten to read: '(6) Pay a supervision fee as specified in subsection (c1)'." However, subsection (a) of this section is not divided into subdivisions, and it is apparent that the amendment was intended to be made to subdivision (b)(6). Subsequently, Session Laws 1987, c. 282, s. 33 and c. 579, s. 1 amended Session Laws 1985 (Reg. Sess. 1986), c. 859, s. 1 by substituting reference to subdivision (b)(6) for reference to subdivision (a)(6).

Session Laws 1987, c. 819, s. 37 provides that victims of offenses occurring on or after August 13, 1987, may be eligible to receive awards under the act

only if the 1987 General Assembly appropriates money for the Crime Victims Compensation Fund. See Session Laws 1987, c. 738, "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 830, s. 1.1 provides that the act shall be known as "The State Aid for Nonstate Agencies Act of 1987."

Session Laws 1987, c. 819, s. 34 and c. 830, s. 121 are severability clauses.

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective retroactive to October 1, 1983, added the former second and third sentences of subsection (d), and added "and the purchase of the proper license or licenses in lieu of a fine" at the end of the present fifth sentence of subsection (d).

The 1985 amendment, effective 14 days after ratification, substituted "counsel, public defender, or appellate defender" for "counsel or public defender" in subdivision (b)(10), added subdivision (b1)(8a), in subsection (d),

deleted the former second and third sentences, relating to the purchase of the proper licenses in lieu of a fine when a person has been convicted of hunting, trapping or fishing without the proper license or licenses, added "but the court is not required to make findings of fact or conclusions of law on these matters when the sentence is imposed" at the end of the present second sentence, rewrote the present fifth sentence, which formerly read: "As used herein, 'restitution' shall mean compensation for damage or loss as could ordinarily be recovered by an aggrieved party in a civil action and the purchase of the proper license or licenses in lieu of a fine," added "and except that the State may receive restitution for the total amount of a judgment authorized by G.S. 7A-455(b)" at the end of the present eighth sentence, and added the language beginning "but the liability of a third party to pay indemnity to an aggrieved party" at the end of the present tenth sentence. The act was ratified June 26, 1985.

The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, and applicable only to offenses committed on or after that date, added subsection (c1). The amendment also purported to rewrite subdivision (a)(6).

Session Laws 1987, c. 282, s. 33, effective June 4, 1987, amended Session Laws 1985 (Reg. Sess., 1986), c. 859, s. 1, so as to provide that subdivision (b)(6) of

this section, and not subdivision (a)(6), was amended thereby.

Session Laws 1987, c. 397, s. 1, effective October 1, 1987, and applicable to all offenses committed on or after that date, inserted "including all real and personal property owned by the defendant and the income derived from such property" in the second sentence of subsection (d).

Session Laws 1987, c. 579, ss. 1 and 2, made effective September 1, 1987, by Session Laws 1987, c. 830, s. 17, and applicable to all persons on supervised probation or parole prior to that date and to all persons placed on supervised probation or parole on or after that date, also amended Session Laws 1985 (Reg. Sess., 1986), c. 859, s. 1 so as to provide that subdivision (b)(6) of this section, and not subdivision (a)(6), was amended thereby. In addition, the amendment substituted "fee of fifteen dollars (\$15.00)" for "fee of ten dollars (\$10.00)" in subsection (c1).

Session Laws 1987, c. 598, s. 1, effective October 1, 1987, and applicable to any person sentenced or any juvenile dispositional hearing held on or after that date, designated former subdivision (9) as present subdivision (10) and added present subdivision (9).

Session Laws 1987, c. 819, s. 32, effective August 13, 1987, rewrote the seventh and final sentences of subsection (d).

CASE NOTES

I. GENERAL CONSIDERATION.

Independent Findings as to Probation Violations. — Whether or not the violations of probation by the defendant were adjudicated as criminal charges was irrelevant where the judge, upon revoking defendant's probation, made independent findings of his own as to the commission of these crimes, hearing testimony from four witnesses, including the defendant himself. *State v. Monroe*, 83 N.C. App. 143, 349 S.E.2d 315 (1986).

A verdict acquitting the defendant of criminal charges is not binding on a judge making independent findings as to revocation of probation based upon the evidence before him or her. *State v. Monroe*, 83 N.C. App. 143, 349 S.E.2d 315 (1986).

Defendant may not raise an initial objection to a condition of probation on appeal, but must first object no later

than the revocation hearing. *State v. Tozzi*, — N.C. App. —, 353 S.E.2d 250 (1987).

Where the record on appeal contained no written or oral objections by defendant raising the issue of a defect in the original judgment at the revocation hearing, defendant waived this issue on appeal. *State v. Tozzi*, — N.C. App. —, 353 S.E.2d 250 (1987).

Discretion of Court. — The court has substantial discretion in devising conditions under subdivision (b1)(9) of this section. *State v. Harrington*, 78 N.C. App. 39, 336 S.E.2d 852 (1985).

A trial court need not make specific findings in support of its recommendation of work release. *State v. Hunt*, 80 N.C. App. 190, 341 S.E.2d 350 (1986).

Applied in *In re Kivett*, 309 N.C. 635, 309 S.E.2d 442 (1983); *State v. Rogers*,

68 N.C. App. 358, 315 S.E.2d 492 (1984); State v. Hunter, 71 N.C. App. 602, 323 S.E.2d 43 (1984).

Stated in State v. Dula, 312 N.C. 80, 320 S.E.2d 405 (1984).

Cited in State v. Bryant, — N.C. —, 350 S.E.2d 358 (1986).

II. VALID CONDITIONS.

Constitutionality. —

Language of subdivision (b)(1) of this section stating that a probationer must "commit no criminal offense" is not unconstitutionally vague. State v. Monroe, 83 N.C. App. 143, 349 S.E.2d 315 (1986).

Where defendant was convicted of driving while impaired, the court did not err in imposing, as a condition of probation, the requirement that defendant not go upon the premises of any business or private club licensed by the state for the sale or the on-premises consumption of alcoholic beverages between 8:00 p.m. and 6:00 a.m. the following day, as such condition was reasonably aimed at preventing recurrence of the subject misconduct by keeping defendant away from alcohol in public places during the hours when he would most likely be tempted to drink and drive. State v. Harrington, 78 N.C. App. 39, 336 S.E.2d 852 (1985).

Restitution of Amount Paid by State. — Where defendant was convicted of possession and delivery of cocaine, and the trial court offered him the option of serving a three-year active sentence or serving six months and paying \$600.00 restitution, and the amount ordered was patently relevant to the pecuniary injury inflicted upon the State by defendant's criminal activities, in that \$600.00 was paid by an agent of the State for the purchase of cocaine, the restitution ordered was reasonably related to the rehabilitative objectives of probation, and the condition was reasonable and just under the circumstances of the case. State v. Stallings, 316 N.C. 535, 342 S.E.2d 519 (1986).

IV. RESTITUTION.

Constitutionality. — The provision in subsection (d) of this section "that no third party shall benefit by way of restitution or reparation as a result of liability of that third party to pay indemnity to an aggrieved party for the damage or loss caused by the defendant" does not violate the equal protection clause of the federal Constitution or N.C. Const., Art.

I, § 19 or Art. I, § 32. State v. Stanley, 79 N.C. 379, 339 S.E.2d 668 (1986).

The constitutionality of a reparation requirement may only be considered if and when restitution is ordered. State v. Arnette, 67 N.C. App. 194, 312 S.E.2d 547 (1984).

The constitutionality of a reparation requirement may only be determined by considering defendant's financial status at the time when restitution may be paid. Where restitution was not imposed as a condition of parole or work release, there was no equal protection violation. State v. Arnette, 67 N.C. App. 194, 312 S.E.2d 547 (1984).

A requirement that a defendant pay restitution as a condition of parole or work release is not inherently unconstitutional. State v. Arnette, 67 N.C. App. 194, 312 S.E.2d 547 (1984).

What Restitution Orders Are Constitutionally Valid. — If a restitution order is directly related to the criminal offense for which the defendant was convicted, it is constitutionally valid. State v. Froneberger, 81 N.C. App. 398, 344 S.E.2d 344 (1986).

For an order of restitution to be valid it must be related to the criminal act for which defendant was convicted, or else the provision may run afoul of the constitutional provision prohibiting imprisonment for debt. State v. Froneberger, 81 N.C. App. 398, 344 S.E.2d 344 (1986).

Necessity of Findings of Fact. — The trial court is not required to make specific findings of fact in support of its recommendation of work release. However, any order or recommendation for restitution to the aggrieved party as a condition of obtaining work release must be supported by the evidence. State v. Burkhead, — N.C. App. —, 355 S.E.2d 175 (1987).

Restitution cannot be comprised of punitive damages. State v. Burkhead, — N.C. App. —, 355 S.E.2d 175 (1987).

Subsection (d) merely precludes an indemnitor from receiving court-ordered restitution as a condition of a criminal defendant's probation. An indemnitor's right to pursue civil remedies against the criminal defendant, or against the insured to recover funds paid by the criminal defendant to the insured, remains intact. State v. Stanley, 79 N.C. App. 379, 339 S.E.2d 668 (1986).

Restitution Order Precluded Where Victim Was Fully Compensated.

sated by Insurer. — Where the evidence established that the insurer paid the owner the largest fair market value figure contained in the evidence for vehicle destroyed by defendant, and since subsection (d) of this section prohibits restitution to the insurer, the court was without authority to order restitution as a condition of defendant's probation. *State v. Maynard*, — N.C. App. —, 338 S.E.2d 609 (1986).

Order Must Be Supported, etc. —

A recommendation of restitution must be supported by the evidence before the trial court. *State v. Hunt*, 80 N.C. App. 190, 341 S.E.2d 350 (1986).

Amount of Restitution Must Be Supported by Evidence. — Regardless of whether restitution is ordered or recommended by the trial court, the amount must be supported by the evidence. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557, *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986).

Fair Market Value as Measure of Restitution. — The court could order defendant to pay to victim a sum no higher than the largest figure contained in the evidence representing fair market value as a condition of probation, where defendant destroyed victim's automobile in the course of unauthorized use of it. *State v. Maynard*, 79 N.C. App. 451, 339 S.E.2d 666 (1986).

This section does not require the trial judge to find and enter facts when imposing a judgment of probation. Rather, it requires the court to take into consideration the resources of defendant, her ability to earn, her obligation to support dependents, and such other matters as shall pertain to her ability to make restitution or reparation. *State v. Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986).

Neither the Parole Commission, etc. —

A recommendation of restitution as a condition of work-release is not binding on the Parole Commission or Department of Corrections. *State v. Daye*, 78 N.C. App. 753, 338 S.E.2d 557, *aff'd per curiam*, 318 N.C. 502, 349 S.E.2d 576 (1986).

Review of Court's Recommendation. — Where there is some evidence as to the appropriate amount of restitution, the trial court's recommendation will not be overruled on appeal. *State v. Hunt*, 80 N.C. App. 190, 341 S.E.2d 350 (1986).

Neither the Parole Commission

nor the Department of Correction is bound by the judge's recommendation of restitution as a condition of parole or work release. *State v. Arnette*, 67 N.C. App. 194, 312 S.E.2d 547 (1984).

There is no single model to which all State repayment programs must conform. However, the Supreme Court in *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974); and *James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972), has carefully identified the basic features separating a constitutionally acceptable recoupment or restitution program from one that is fatally defective. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

North Carolina's procedures for imposing the reimbursement of court-appointed counsel fees as a condition of parole are narrowly drawn to avoid unfairness and discriminatory effects. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

Though far from a paragon of clarity and detail as a complete program, the North Carolina statutes relating to the repayment of attorney's fees by restitution embody all the required features of a constitutionally acceptable approach. The indigent defendant's fundamental right to counsel is preserved under the North Carolina statute and no preconditions are placed on the exercise of that right beyond a reasonable and minimally intrusive procedure designed to establish the fact of indigency. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

Reparation of injuries to a party, etc. —

Although the North Carolina Supreme Court has never definitively decided the issue, there is persuasive authority in North Carolina law supporting the State's right to claim the status of an aggrieved party for the expenses associated with providing court-appointed counsel. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

North Carolina, like every jurisdiction, has an irrevocable constitutional duty to provide court-appointed counsel to an indigent defendant once he requests it. The developing jurisprudence in this area, however, does not require the State to absorb the expenses of providing such counsel when the defendant has acquired the financial ability to pay. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

The North Carolina Legislature has

included government agencies, whether federal, State or local in its definition of an aggrieved party. This definition, however, also contains an important proviso limiting the inmate's restitution obligations to particular and definite expenses not related to the government agency's normal operating costs. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

Pawnbrokers as "Aggrieved Parties." — Where, shortly after defendant committed larceny, he presented the stolen items to pawnshops as collateral for loans, and the stolen items were returned to the rightful owner, so that the pawnbrokers thus lost the collateral that secured their loans and were at risk of loss or damage if the loans were not repaid, under the particular facts presented, the pawnbrokers were within

the meaning and intent of the phrase "aggrieved parties" as used in subsection (d) of this section and were proper subjects for restitution as a condition of defendant's probation. *State v. Froneberger*, 81 N.C. App. 398, 344 S.E.2d 344 (1986).

Award Denied Because of Lack of Evidence of Pain and Suffering. — Even if a trial court's recommendation of restitution can include damages for pain and suffering, where the only evidence supporting the amount of restitution was that the victim had unpaid medical bills in the amount of \$442.00, and there was no evidence as to the amount of the victim's pain and suffering, the evidence as reported in the record did not support restitution in the amount of \$5,000.00. *State v. Burkhead*, — N.C. App. —, 355 S.E.2d 175 (1987).

§ 15A-1344. Response to violations; alteration and revocation.

CASE NOTES

Effect of Consent to Probation Conditions. — By consenting to the conditions of probation, defendants do nothing more than acknowledge that they are "subject to" imposition of the original sentence. They do not forfeit

their right to a knowing and voluntary waiver of counsel in a subsequent probation revocation hearing. *State v. Warren*, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

§ 15A-1344.1. Procedure to insure payment of child support.

(a) When the court requires, as a condition of supervised or unsupervised probation, that a defendant support his children, the court may order at any time that support payments be made to the clerk of court for remittance to the party entitled to receive the payments.

(b) After entry of such an order by the court, the clerk of court shall maintain records listing the amount of payments, the date payments are required to be made, and the names and addresses of the parties affected by the order.

(c) The parties affected by the order shall inform the clerk of court of any change of address or of other condition that may affect the administration of the order. The court may provide in the order that a defendant failing to inform the court of a change of address within reasonable period of time may be held in violation of probation.

(d) When a defendant in a non-IV-D case, as defined in G.S. 110-129, fails to make required payments of child support and is in arrears, the clerk of superior court may mail by regular mail to the last known address of the defendant a notice of delinquency which

shall set out the amount of child support currently due and which shall demand immediate payment of said amount. Failure to receive the delinquency notice shall not be a defense in any probation violation hearing or other proceeding thereafter. If the arrearage is not paid in full within 21 days after the mailing of the delinquency notice, or is not paid within 30 days after the defendant becomes delinquent if the clerk has elected not to send a delinquency notice, the clerk shall certify the amount due to the district attorney and probation officer, who shall initiate proceedings for revocation of probation pursuant to Article 82 of Chapter 15A or make a motion in the criminal case for income withholding pursuant to G.S. 110-136.5 or both.

When a defendant in a IV-D case, as defined in G.S. 110-129, fails to make required payments of child support and is in arrears, at the request of the IV-D obligee the clerk shall certify the amount due to the district attorney and probation officer, who shall initiate proceedings for revocation of probation pursuant to Article 82 of Chapter 15A or make a motion in the criminal case for income withholding pursuant to G.S. 110-136.5 or both. (1983, c. 567, s. 1; 1983 (Reg. Sess., 1984), c. 1100, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 949, s. 7.)

Editor's Note. —

The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, inserted "or suspended sentence" in subsection (a) and added "or proceedings for activation of the suspended sentence, if the defendant is not on probation" at the end of subsection (d). Session Laws 1983 (Reg. Sess., 1984), c. 1100, s. 3, made the act effective upon ratification and provided that it would expire on June 1, 1985. The amendment has expired by its own

terms on June 1, 1985, and has been deleted from the section.

Section 9 of Session Laws 1985 (Reg. Sess., 1986), c. 949, provides: "Nothing in this act shall be construed as affecting any garnishment proceeding heretofore or hereafter instituted." The act is effective October 1, 1986, pursuant to s. 10 of c. 949.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective October 1, 1986, rewrote subsection (d).

§ 15A-1345. Arrest and hearing on probation violation.

CASE NOTES

I. GENERAL CONSIDERATION.

Constitutionality. — The evidentiary standard and State's burden of proof applied to probation revocation hearings pursuant to Subsection (e) of this section are not unconstitutionally indefinite. *State v. Tozzi*, — N.C. App. —, 353 S.E.2d 250 (1987).

Due Process to Be Afforded Prior to Revocation. — Under § 15A-1341(c), a defendant is given the election between imprisonment and probation in the first instance; and once he chooses probation, this section guarantees full due process before there can be a revocation of probation and a resulting prison

sentence. *State v. Hunter*, 315 N.C. 371, 338 S.E.2d 99 (1986).

Right to Counsel at Probation Revocation Hearings. — There is a statutorily recognized right to counsel at probation revocation hearings in North Carolina that goes beyond the federal constitutional right enunciated in *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S. Ct. 1756, 36 L. Ed. 2d 656 (1973). *State v. Warren*, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

Waiver of Right to Counsel. — Right to counsel at probation revocation hearing can be knowingly, intelligently and voluntarily waived; however, waiver cannot be inferred from a silent

record. *State v. Warren*, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

What Record Must Show on Waiver of Counsel. — When a defendant waives counsel at or before the trial phase of the proceedings against him, the record must show that the defendant was literate and competent, that he understood the consequences of the waiver, and that, in waiving the right, the defendant was voluntarily exercising his own free will. *State v. Warren*, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

A waiver of counsel is ineffective at the probation revocation stage when the record fails to show that the defendant has knowingly and voluntarily waived the right; that is, after the trial court has made thorough inquiry and is satisfied that the defendant has been clearly advised of the right to counsel, that the defendant understands and appreciates the consequences of the decision to proceed pro se, and that the defendant comprehends the nature of the charges and proceedings and the range of possible punishments. *State v. Warren*, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise. *State v. Warren*, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

Consenting to Conditions of Probation Does Not Waive Right to Counsel. — By consenting to the conditions of probation, defendants do nothing more than acknowledge that they are "subject to" imposition of the original sentence. They do not forfeit their right to a knowing and voluntary waiver of counsel in a subsequent probation revocation hearing. *State v. Warren*, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

Any violation of a valid condition of probation is sufficient to revoke defendant's probation. All that is required to revoke probation is evidence satisfying the trial court, in its discretion, that the defendant violated a valid condition of probation without lawful excuse. *State v. Tozzi*, — N.C. App. —, 353 S.E.2d 250 (1987).

Cited in *State v. Cunningham*, 63 N.C. App. 470, 305 S.E.2d 193 (1983).

III. BURDEN AND STANDARD OF PROOF.

Evidence Must Reasonably Satisfy Judge.

The State's burden of proof during probation revocation hearings is to present evidence that reasonably satisfies the trial court in its discretion that defendant has violated a valid condition of probation. *State v. Tozzi*, — N.C. App. —, 353 S.E.2d 250 (1987).

The burden is on the defendant to present competent evidence of his inability to comply with the terms of his probation; otherwise, evidence of defendant's failure to comply may justify a finding that defendant's failure to comply was wilful or without lawful excuse. *State v. Crouch*, 74 N.C. App. 565, 328 S.E.2d 833 (1985); *State v. Tozzi*, — N.C. App. —, 353 S.E.2d 250 (1987).

Burden of Proving Inability to Pay Fine or Restitution. — In a probation revocation proceeding based upon defendant's failure to pay a fine or restitution which was a condition of his probation, the burden is upon the defendant to offer evidence of his inability to pay money according to the terms of the probationary judgment. *State v. Jones*, 78 N.C. App. 507, 337 S.E.2d 195 (1985).

IV. EVIDENCE.

Where defendant has presented competent evidence of his inability to comply with the terms of his probation, he is entitled to have that evidence considered and evaluated before the trial court can properly order revocation. *State v. Crouch*, 74 N.C. App. 565, 328 S.E.2d 833 (1985).

Counsel's statements with respect to defendant's inability to comply with the terms of his defendant's probation were not competent evidence, and the trial court was not, therefore, under a duty to make specific findings with respect to defendant's alleged inability to comply. *State v. Crouch*, 74 N.C. App. 565, 328 S.E.2d 833 (1985).

ARTICLE 83.

*Imprisonment.***§ 15A-1351. Sentence of imprisonment; incidents; special probation.**

(f) Work Release. — When sentencing a person convicted of a felony, the sentencing court may recommend that the sentenced offender be granted work release as authorized in G.S. 148-33.1. When sentencing a person convicted of a misdemeanor, the sentencing court may recommend or, with the consent of the person sentenced, order that the sentenced offender be granted work release as authorized in G.S. 148-33.1.

(h) The sentencing court may recommend that the sentenced offender be assigned to the Substance Abuse Treatment Unit for treatment of alcoholism or substance abuse during his imprisonment. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 15-17; 1979, c. 749, ss. 5-7; c. 760, s. 4; 1987, c. 738, s. 111(e).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. —

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Session Laws 1987, c. 738, s. 111(g) provides that s. 111 is effective upon ratification (August 7, 1987), except that the inpatient program shall began January 1, 1988. Section 111(g) further provides that all positions authorized by s.

111 of c. 738 shall be effective October 1, 1987.

Session Laws 1987, c. 738, s. 1.1 provides c. 738 shall be known as "The Current Operations Appropriations Act of 1987."

Session Laws 1987, c. 738, s. 237 is a severability clause.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, rewrote subsection (f).

The 1987 amendment, effective August 7, 1987, added subsection (h).

CASE NOTES

Applied in *State v. Sills*, 311 N.C. 370, 317 S.E.2d 379 (1984).

§ 15A-1352. Commitment to Department of Correction or local confinement facility.

(a) A person sentenced to imprisonment for a misdemeanor under this Article or for nonpayment of a fine under Article 84 of this Chapter shall be committed for the term designated by the court to the custody of the Department of Correction or to a local confinement facility. If the sentence imposed for a misdemeanor is for a period of 180 days or less, the commitment must be to a facility other than one maintained by the Department of Correction, except as provided in G.S. 148-32.1(b).

If a person is sentenced to imprisonment for a misdemeanor under this Article or for nonpayment of a fine under Article 84 of this Chapter, the sentencing judge shall make a finding of fact as to whether the person would be suitable for placement in a county satellite jail/work release unit operated pursuant to G.S.

153A-230.3. If the sentencing judge makes a finding of fact that the person would be suitable for placement in a county satellite jail/work release unit and the person meets the requirements listed in G.S. 153A-230.3 (a)(1), then the judge may order the misdemeanor to be placed in a county satellite jail/work release unit.

(d) Notwithstanding any other provision of law, when the sentencing court, with the consent of the person sentenced, orders that a person convicted of a misdemeanor be granted work release, the court may commit the person to a specific prison facility or local confinement facility within the county of the sentencing court in order to facilitate the work release arrangement. When appropriate to facilitate the work release arrangement, the sentencing court may, with the consent of the sheriff or board of commissioners, commit the person to a specific local confinement facility in another county, or, with the consent of the Department of Correction, commit the person to a specific prison facility in another county. The Department of Correction may transfer a prisoner committed to a specific prison facility to a different facility when necessary to alleviate overcrowding or for other administrative purposes. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 18; 1979, c. 456, s. 1; c. 787, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 1014, s. 201(b); 1987, c. 207, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Session Laws 1987, c. 207, s. 4 provides that the act shall not be construed to obligate the General Assembly to make any appropriation to implement

its provisions, nor shall it be construed to obligate the State to make any grant for which no funds have been appropriated by the General Assembly.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, added subsection (d).

The 1987 amendment, effective July 1, 1987, added the last paragraph of subsection (a).

OPINIONS OF ATTORNEY GENERAL

Definition of "Local Confinement Facility". — Although by its terms, the definition of "local confinement facility" in § 153A-217(5) applies only to Chapter 153A, Article 10, Pt. 1, as this definition is the only definition of "local confinement facility" appearing in the General Statutes, it may be assumed that this was the meaning intended by the General Assembly when it adopted § 15A-1352(a). See opinion of Attorney General to Mr. Bruce Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Effect of Section on § 15-6. — This section is an exception to § 15-6, regarding imprisonment in county jail, as to those misdemeanants with sentences of more than 180 days, because they may be sentenced to serve their term of imprisonment under the jurisdiction of the Department of Correction, but as to those not placed in the custody of the Department of Correction, the only ef-

fect of § 15A-1352 is to broaden the term "common jail" to include other types of local facilities which may be used under appropriate circumstances. See opinion of Attorney General to Mr. Bruce Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Section Overrides § 15-6 as to Certain Criminals. — While § 15-6 applies to both felons and misdemeanants, this section overrides § 15-6 to the extent it provides for certain felons and misdemeanants to be sentenced to terms of imprisonment under the jurisdiction of the N.C. Department of Correction. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Place of Imprisonment Where Sentence Less than and Greater than 180 Days. — Absent specific statutory authorization (see, e.g., §§ 15A-711,

148-32.1, 162-38 to 162-40), imprisonment of misdemeanants with sentences of 180 days or less must be in the local confinement facility of the county where the crime was committed. If the sentence is greater than 180 days, commitment may be either to such a local facility or to the N.C. Department of Correction. See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County

Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

Misdemeanants with sentences of 180 days or less are not to be sent to the Department of Correction, but must be jailed in a "local confinement facility" (subject to the limited exception found at § 148-32.1). See opinion of Attorney General to Mr. Bruce E. Colvin, Assistant County Attorney, Forsyth County, 55 N.C.A.G. 21 (1985).

§ 15A-1353. Order of commitment when imprisonment imposed; release pending appeal.

(f) When the sentencing court, with the consent of the person sentenced, orders that a person convicted of a misdemeanor be granted work release, the following provisions must be included in the commitment, or in a separate order referred to in the commitment:

- (1) The date work release is to begin;
- (2) The prison or local confinement facility to which the offender is to be committed;
- (3) A provision that work release terminates the date the offender loses his job or violates the conditions of the work-release plan established by the Department of Correction; and
- (4) A determination whether the earnings of the offender are to be disbursed by the Department of Correction or the clerk of the sentencing court in the manner that the court in its order directs. (1977, c. 711, s. 1; 1979, c. 758, s. 1; 1983, c. 389; 1985 (Reg. Sess., 1986), c. 1014, s. 201(c).)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, added subsection (f).

§ 15A-1354. Concurrent and consecutive terms of imprisonment.

(a) **Authority of Court.** — When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, including a term of imprisonment in another jurisdiction, the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently.

(1977, c. 711, s. 1; 1979, c. 760, s. 4; 1979, 2nd Sess., c. 1316, s. 40; 1985, c. 21.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1985 amendment, effective March 21, 1985,

and applicable only to offenses committed on or after that date, rewrote the last sentence of subsection (a), which read: "If not specified, sentences shall run concurrently."

CASE NOTES

Fair Sentencing Act Did Not Remove Power to Impose Consecutive Sentences. — Although the General Assembly did not address the issue of consecutive sentences in the Fair Sentencing Act, § 15A-1340.1 et seq., it left substantially intact subsection (a) of this section, which vests the sentencing judge with discretion to impose either consecutive or concurrent sentences. Since subsection (a) of this section was in effect when the Legislature enacted the Fair Sentencing Act, the Legislature by leaving it substantially intact must have intended that the sentencing judge retain the discretion to impose sentences consecutively or concurrently. *State v. Ysaguiere*, 309 N.C. 780, 309 S.E.2d 436 (1983).

The General Assembly, by leaving this section substantially intact when it enacted the Fair Sentencing Act, must have intended that the sentencing judge retain discretion to impose consecutive sentences. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

The court retained the discretion to impose consecutive sentences after the enactment of the Fair Sentencing Act. *State v. Shea*, 82 N.C. App. 84, 343 S.E.2d 437 (1986).

Consecutive Sentencing Does Not Violate Fair Sentencing Act. — Leaving sentencing judges with unbridled discretion on the matter of whether to run multiple sentences concurrently or consecutively conflicts with the general theory of uniformity sought by fair sentencing. Nevertheless, the Legislature, in espousing both the spirit and the letter of fair sentencing in North Carolina, elected to incorporate the freedom for judges to impose consecutive sentences. Since that is the prerogative of the Legislature, there is nothing inherent in consecutive sentencing which violates the Fair Sentencing Act, § 15A-1340.1

et seq. *State v. Ysaguiere*, 309 N.C. 780, 309 S.E.2d 436 (1983).

Consecutive Sentences Authorized by Subsection (a). — A trial court is given express authority by subsection (a) of this section to require that the sentence imposed for a conviction be served consecutive to any sentence imposed at the same time or any undischarged term of imprisonment to which the defendant is already subject. *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986).

Imposition of Consecutive Sentences Upheld. — The imposition of consecutive sentences for conspiracy to commit armed robbery, first-degree murder, armed robbery, second-degree burglary, and breaking or entering and larceny does not violate any constitutional proportionality requirement. *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986).

New Sentence Made Consecutive to Prior Sentences on Probation Revocation. — It was not necessary for the trial court, in probation revocation proceedings, to state that the activated sentences in 1983 and 1984 cases would run consecutively with 1985 case, because it was to happen the other way around, and the court properly designated the sentence in the 1985 case to run consecutive with any sentence defendant might receive from probation revocation. *State v. Warren*, 82 N.C. App. 84, 345 S.E.2d 437 (1986).

Imposition of consecutive sentences for rape, first-degree sex offense, first-degree burglary and armed robbery violates neither the Fair Sentencing Act, § 15A-1340.1 et seq., nor any constitutional proportionality requirement. *State v. Ysaguiere*, 309 N.C. 780, 309 S.E.2d 436 (1983).

Applied in *State v. Grier*, 314 N.C. 59, 331 S.E.2d 669 (1985).

§ 15A-1355. Calculation of terms of imprisonment.

CASE NOTES

Conduct Prior to Original Trial and Sentencing. — An inmate's good behavior prior to his original trial and/or the sentencing hearing may be found as a nonstatutory mitigating factor, and his bad conduct during the same time frame may be found as a nonstatutory aggravating factor. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986).

Conduct Between Conviction and Resentencing. — As § 15A-1335 prohibits the trial court from resentencing a defendant to a term of imprisonment greater than the prior sentence less the portion of the prior sentence previously served, a trial judge in North Carolina may not consider a defendant's bad conduct during the period between his conviction and the resentencing hearing to increase his sentence. However, bad conduct may be found by the trial judge as a nonstatutory aggravating factor to be utilized by the judge in deciding the sentence to be imposed, so long as the new sentence is no more severe than the original one. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986).

A defendant's good conduct while incarcerated during the period from his conviction until the time of his resentencing hearing may, in the discretion of the trial judge, be found as a nonstatutory mitigating factor under the Fair Sentencing Act. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986).

Trial judge's remarks concerning the effect of "good time" and "gain time" were not an expression of dissatisfaction with the length of time convicted criminals must serve in prison, but were made in an effort to respond to defense counsel's impassioned argument concerning the fact that the defendant would be required to serve other sentences totalling four years at the expiration of the sentence at issue; thus it could not be said by such remarks that the trial court was using the sentencing process to thwart the Fair Sentencing Act. *State v. Swimm*, 316 N.C. 24, 340 S.E.2d 65 (1986).

Cited in *Little v. Allsbrook*, 731 F.2d 238 (4th Cir. 1984).

ARTICLE 84.

Fines.

§ 15A-1361. Authorized fines and penalties.

A person who has been convicted of a criminal offense may be ordered to pay a fine as provided by law. A person who has been found responsible for an infraction may be ordered to pay a penalty as provided by law. Unless the context clearly requires otherwise, references in this Article to fines also include penalties. (1977, c. 711, s. 1; 1985, c. 764, s. 6.)

Editor's Note. —

Session Laws 1985, c. 764, s. 40, as amended by Session Laws 1985 (Reg. Sess., 1986), c. 852, s. 17, provides: "This act shall become effective September 1, 1986, and shall apply to offenses committed on or after that date. Offenses committed before the effective date of this act [September 1, 1986] shall be

governed by the law in effect at the time of the offense.

Effect of Amendments. — The 1985 amendment, effective September 1, 1986, and applicable to offenses committed on or after that date, substituted "a criminal offense" for "an offense" in the first sentence and added the second sentence.

§ 15A-1364. Response to nonpayment.

CASE NOTES

Burden of Proving Inability to Pay. — In a probation revocation proceeding based upon defendant's failure to pay a fine or restitution which was a condition of his probation, the burden is

upon the defendant to offer evidence of his inability to pay money according to the terms of the probationary judgment. *State v. Jones*, 78 N.C. App. 507, 337 S.E.2d 195 (1985).

§ 15A-1365. Judgment for fines docketed; lien and execution.

When a defendant has defaulted in payment of a fine or costs, the judge may order that the judgment be docketed. Upon being docketed, the judgment becomes a lien on the real estate of the defendant in the same manner as do judgments in civil actions. Executions on docketed judgments may be stayed only when an appeal is taken and security is given as required in civil cases. If the judgment is affirmed on appeal to the appellate division, the clerk of the superior court, on receipt of the certificate from the appellate division, must issue execution on the judgment. The clerk may not issue an execution, however, if the fine or costs were imposed for an offense other than trafficking in controlled substances or conspiring to traffic in controlled substances under G.S. 90-95(h) and (i), respectively, and the defendant elects to serve the suspended sentence, if any, or serve a term of 30 days, if no suspended sentence was imposed. (1977, c. 711, s. 1; 1985, c. 411.)

Effect of Amendments. — The 1985 amendment, effective June 17, 1985, rewrote the last sentence, which formerly read: "No execution may issue if the de-

fendant elects to serve the suspended sentence or, if no suspended sentence was imposed, a term of 30 days."

ARTICLE 85.

Parole.

§ 15A-1370.1. Applicability of Article 85.

CASE NOTES

I. GENERAL CONSIDERATION.

Applied in *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984).

§ 15A-1371. Parole eligibility, consideration, and refusal.

(h) Community Service Parole. — Notwithstanding the provisions of any other subsection herein, certain prisoners specified herein shall be eligible for community service parole, in the discretion of the Parole Commission.

Community service parole is early parole for the purpose of participation in a program of community service under the supervision of a probation/parole officer. A parolee who is paroled under this subsection must perform as a condition of parole 32 hours of community service for every month of his remaining active sentence, until at least his minimum sentence (if he was sentenced prior to July 1, 1981), or one-half of his sentence imposed under G.S. 15A-1340.4 has been completed by such community service, at which time parole may be terminated.

The probation/parole officer and the community service coordinator shall develop a program of community service for the parolee. The parolee must as a condition of parole complete at least 32 hours of community service per 30-day period. The community service coordinator shall report any willful failure to perform community service work to the probation/parole officer. Parole may be revoked for any parolee who willfully fails to perform community service work as directed by a community service coordinator. The provisions of G.S. 15A-1376 shall apply to this violation of a condition of parole.

Community service parole eligibility shall be available to a prisoner:

- (1) Who is serving his first active sentence the term of which exceeds one year; and
- (2) Who, in the opinion of the Parole Commission, is unlikely to engage in further criminal conduct; and
- (3) Who agrees to complete service of his sentence as herein specified; and
- (4) Who has served one-half of his minimum sentence (if he was sentenced prior to July 1, 1981), or one-fourth of a sentence imposed under G.S. 15A-1340.4.

For purposes of subdivision (1), a person is considered to be serving his first active sentence the term of which exceeds one year if he

- a. Was convicted or sentenced in the same session of court of multiple offenses arising from the same transaction or series of transactions or his probationary sentence was revoked in the same such session of court,
- b. Is serving an active sentence of at least one year for one of the multiple offenses described in sub-subdivision a., and
- c. Had not received an active sentence of a[t] least one year prior to being sentenced for the multiple offenses described in sub-subdivision a.

In computing the service requirements of subdivision (4) of this subsection, credit shall be given for good time and gain time credit earned pursuant to G.S. 148-13. Nothing herein is intended to create or shall be construed to create a right or entitlement to community service parole in any prisoner.

(i) A fee of one hundred dollars (\$100.00) shall be paid by all persons who participate in the Community Service Parole Program. That fee must be paid to the clerk of court in the county in which

the parolee is released. The fee must be paid in full within two weeks unless the Parole Commission, upon a showing of hardship by the person, allows him additional time to pay the fee. The parolee may not be required to pay the fee before he begins the community service unless the Parole Commission specifically orders that he do so. Fees collected under this subsection shall be deposited in the General Fund. The fee imposed under this section may be paid as prescribed by the supervising parole officer. (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, ss. 19A-22; 1979, c. 749, ss. 9, 10; 1979, 2nd Sess., c. 1316, s. 42; 1981, c. 63, s. 1; c. 179, s. 14; 1983 (Reg. Sess., 1984), c. 1098, s. 1; 1985, c. 453, ss. 1, 2; 1985 (Reg. Sess., 1986), c. 960, s. 2; c. 1012, ss. 2, 5; 1987, c. 47; c. 783, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. —

Session Laws 1983 (Reg. Sess., 1984), c. 1098, s. 1.1, provides; "Nothing in this act shall obligate the General Assembly to appropriate additional funds."

In paragraph c in the next-to-last paragraph of subsection (h), it appears that the word "at" was intended preceding "least."

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, added subsection (h).

The 1985 amendment, effective July 1, 1985, rewrote the second and third paragraphs of subsection (h) and added subsection (i).

Session Laws 1985 (Reg. Sess., 1986), c. 960, s. 2, effective July 10, 1986, and

applicable to persons who are prisoners on or after July 10, 1986, added the first sentence of the last paragraph of subsection (h).

Session Laws 1985 (Reg. Sess., 1986), c. 1012, ss. 2 and 5, effective August 1, 1986, substituted "one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" in the first sentence of subsection (i) and added the last sentence of subsection (i).

The 1987 amendment, effective April 6, 1987, and applicable to all prisoners sentenced prior to, on, or after that date, added the present fourth paragraph of subsection (h).

Session Laws 1987, c. 783, s. 7, effective August 12, 1987, in paragraph (h)a as amended by Session Laws 1987, c. 47 inserted "or his probationary sentence was revoked in the same such session of court."

CASE NOTES

Applied in *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984).

Cited in *Little v. Allsbrook*, 731 F.2d 238 (4th Cir. 1984).

OPINIONS OF ATTORNEY GENERAL

Prisoners eligible for "1/3 parole" under subsection (g) may be granted unsupervised parole by the Parole Commission. — See opinion of Attorney General to Mr. Luther M. Mitchell, Sr., Administrator, North Carolina Parole Commission, 53 N.C.A.G. 74 (1984).

Certain Inmates Not Eligible. — In-

mates convicted of felonies committed on or after July 1, 1981 and sentenced to a term of less than 18 months are not eligible for "1/3 parole" under subsection (g). See opinion of Attorney General to Mr. Luther M. Mitchell, Sr., Administrator, North Carolina Parole Commission, 53 N.C.A.G. 74 (1984).

§ 15A-1374. Conditions of parole.

(b) Appropriate Conditions. — As conditions of parole, the Commission may require that the parolee comply with one or more of the following conditions:

- (1) Work faithfully at suitable employment or faithfully pursue a course of study or vocational training that will equip him for suitable employment.
- (2) Undergo available medical or psychiatric treatment and remain in a specified institution if required for that purpose.
- (3) Attend or reside in a facility providing rehabilitation, instruction, recreation, or residence for persons on parole.
- (4) Support his dependents and meet other family responsibilities.
- (5) Refrain from possessing a firearm, destructive device, or other dangerous weapon unless granted written permission by the Commission or the parole officer.
- (6) Report to a parole officer at reasonable times and in a reasonable manner, as directed by the Commission or the parole officer.
- (7) Permit the parole officer to visit him at reasonable times at his home or elsewhere.
- (8) Remain within the geographic limits fixed by the Commission unless granted written permission to leave by the Commission or the parole officer.
- (9) Answer all reasonable inquiries by the parole officer and obtain prior approval from the parole officer for any change in address or employment.
- (10) Promptly notify the parole officer of any change in address or employment.
- (11) Submit at reasonable times to searches of his person by a parole officer for purposes reasonably related to his parole supervision. The Commission may not require as a condition of parole that the parolee submit to any other searches that would otherwise be unlawful.
- (11a) Make restitution or reparation to an aggrieved party as provided in G.S. 148-57.1.
- (11b) Comply with an order from a court of competent jurisdiction regarding the payment of an obligation of the parolee in connection with any judgment rendered by the court.
- (12) Satisfy other conditions reasonably related to his rehabilitation.

(c) Supervision Fee. — The Commission must require as a condition of parole that the parolee pay a supervision fee of fifteen dollars (\$15.00) per month. The Commission may exempt a parolee from this condition of parole only if it finds that requiring him to pay the fee will constitute an undue economic burden. The fee must be paid to the clerk of superior court designated by the Commission. The clerk must transmit any money collected pursuant to this subsection to the State to be deposited in the general fund of the State. In no event shall a person released on parole be required to pay more than one supervision fee per month. (1977, c. 711, s. 1; 1979, c. 749, s. 11; 1983, c. 562; 1985, c. 474, s. 6; 1987, c. 579, s. 3; c. 830, s. 17.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Session Laws 1987, c. 830, s. 1.1 provides that the act shall be known as "The State Aid for Nonstate Agencies Act of 1987."

Session Laws 1987, c. 830, s. 121 is a severability clause.

Effect of Amendments. —

The 1985 amendment, effective 14 days after ratification, added subdivi-

sion (11b) to subsection (b). The act was ratified June 26, 1985.

Session Laws 1987, c. 579, s. 3, made effective Sept. 1, 1987, by Session Laws 1987, c. 830, s. 17 and applicable to all persons on supervised probation or parole prior to that date and to all persons placed on supervised probation or parole on or after that date, substituted "fee of fifteen dollars (\$15.00)" for "fee of ten dollars (\$10.00)" in the first sentence of subsection (c).

CASE NOTES

Restitution. —

North Carolina is not barred from structuring a program to collect the amount it is owed from a financially-able defendant through reasonable and fairly administered procedures. The State's initiatives in this area naturally must be narrowly drawn to avoid either chilling the indigent's exercise of the right to counsel, or creating discriminating terms of repayment based solely on the defendant's poverty. Beyond these threshold requirements, however, the State has wide latitude to shape its attorneys fees recoupment or restitution program along the lines it deems most appropriate for achieving lawful State objectives. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

North Carolina, like every jurisdiction, has an irrevocable constitutional duty to provide court-appointed counsel to an indigent defendant once he requests it. The developing jurisprudence in this area, however, does not require the State to absorb the expenses of providing such counsel when the defendant has acquired the financial ability to pay. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

Reimbursement of State for Counsel Fees. —

Although the North Carolina Supreme Court has never definitively decided the issue, there is persuasive authority in North Carolina law supporting the State's right to claim the status of an aggrieved party for the expenses associated with providing court-ap-

pointed counsel. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

There is no single model to which all State repayment programs must conform. However, the Supreme Court in *Fuller v. Oregon*, 417 U.S. 40, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974); and *James v. Strange*, 407 U.S. 128, 92 S. Ct. 2027, 32 L. Ed. 2d 600 (1972), has carefully identified the basic features separating a constitutionally acceptable recoupment or restitution program from one that is fatally defective. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

North Carolina's procedures for imposing the reimbursement of court-appointed counsel fees as a condition of parole are narrowly drawn to avoid unfairness and discriminatory effects. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

Though far from a paragon of clarity and detail as a complete program, the North Carolina statutes relating to the repayment of attorney's fees by restitution embody all the required features of a constitutionally acceptable approach. The indigent defendant's fundamental right to counsel is preserved under the North Carolina statute and no preconditions are placed on the exercise of that right beyond a reasonable and minimally intrusive procedure designed to establish the fact of indigency. *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

Cited in *State v. Bryant*, — N.C. —, 350 S.E.2d 358 (1986).

ARTICLE 85A.

*Parole of Certain Convicted Felons.***§ 15A-1380.2. Reentry parole of felons.**

(c) The term of parole for a prisoner paroled under this section shall be 90 days. In the case of an inmate eligible for parole under G.S. 148-4.1 who has less than 270 days remaining on the maximum sentence, the Parole Commission may simultaneously parole and terminate supervision of the prisoner when the Commission finds that such action will not be incompatible with the public interest.

(d) The provisions of G.S. 15A-1373, 15A-1375, and 15A-1376 regarding incidents of parole, commencement of parole, and arrest and hearing on parole violation, shall be applicable to reentry parole of felons, except that G.S. 15A-1373(d) regarding the effect of violation shall not apply. The only conditions of reentry parole shall be those provided by G.S. 15A-1374(b)(6), (7), (8), (9), and (10) and G.S. 15A-1374(c). However, if it appears to the Parole Commission that the prisoner's return to the community poses a threat or danger to the health or safety of the public or the prisoner, the Parole Commission may require as additional conditions of reentry parole those provided by G.S. 15A-1374(b)(2) and (12). Provided, that where the Commission feels that supervision is appropriate for a person eligible for parole under the terms of G.S. 148-4.1 of the North Carolina General Statutes, the conditions applicable to such early parole shall be those provided for by G.S. 15A-1374(b) as specified by the Parole Commission.

(h) Community Service Parole. — Notwithstanding the provisions of any other subsection herein, certain prisoners specified herein shall be eligible for community service parole, in the discretion of the Parole Commission.

Community service parole is early parole for the purpose of participation in a program of community service under the supervision of a probation/parole officer. A parolee who is paroled under this subsection must perform as a condition of parole 32 hours of community service for every month of his remaining active sentence, until at least his minimum sentence (if he was sentenced prior to July 1, 1981), or one-half of his sentence imposed under G.S. 15A-1340.4 has been completed by such community service, at which time parole may be terminated.

The probation/parole officer and the community service coordinator shall develop a program of community service for the parolee. The parolee must as a condition of parole complete at least 32 hours of community service per 30-day period. The community service coordinator shall report any willful failure to perform community service work to the probation/parole officer. Parole may be revoked for any parolee who willfully fails to perform community service work as directed by a community service coordinator. The provisions of G.S. 15A-1376 shall apply to this violation of a condition of parole.

Community service parole eligibility shall be available to a prisoner:

- (1) Who is serving his first active sentence the term of which exceeds one year; and

- (2) Who, in the opinion of the Parole Commission, is unlikely to engage in further criminal conduct; and
- (3) Who agrees to complete service of his sentence as herein specified; and
- (4) Who has served one-half of his minimum sentence (if he was sentenced prior to July 1, 1981), or one-fourth of a sentence imposed under G.S. 15A-1340.4.

For purposes of subdivision (1), a person is considered to be serving his first active sentence the term of which exceeds one year if he

- a. Was convicted or sentenced in the same session of court of multiple offenses arising from the same transaction or series of transactions or his probationary sentence was revoked in the same such session of court,
- b. Is serving an active sentence of at least one year for one of the multiple offenses described in sub-subdivision a., and
- c. Had not received an active sentence of a[t] least one year prior to being sentenced for the multiple offenses described in sub-subdivision a.

In computing the service requirements of subdivision (4) of this subsection, credit shall be given for good time and gain time credit earned pursuant to G.S. 148-13. Nothing herein is intended to create or shall be construed to create a right or entitlement to community service parole in any prisoner.

(i) A fee of one hundred dollars (\$100.00) shall be paid by all persons who participate in the Community Service Parole Program. That fee must be paid to the clerk of court in the county where the parolee is released. The fee must be paid in full within two weeks unless the Parole Commission, upon a showing of hardship by the person, allows him additional time to pay the fee. The parolee may not be required to pay the fee before he begins the community service unless the Parole Commission specifically orders that he do so. Fees collected under this subsection shall be deposited in the General Fund. The fee imposed under this section may be paid as prescribed by the supervising parole officer. (1979, c. 760, s. 4; 1981, c. 662, s. 5; 1983, c. 547; c. 557, ss. 2, 3; 1983 (Reg. Sess., 1984), c. 1098, s. 1; 1985, c. 453, ss. 3, 4; 1985 (Reg. Sess., 1986), c. 859, s. 3; c. 960, s. 2; c. 1012, ss. 3, 6; c. 1014, s. 197(b); 1987, c. 7, s. 5; c. 47; c. 783, s. 7; c. 879, s. 1.2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendments, it is not set out.

Editor's Note. — Session Laws 1983 (Reg. Sess., 1984), c. 1098, s. 1.1, provides: "Nothing in this act shall obligate the General Assembly to appropriate additional funds."

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 243, contains a severability clause.

In paragraph c in the next-to-last paragraph of subsection (h), it appears that the word "at" was intended preceding "least."

Effect of Amendments. —

The 1983 (Reg. Sess., 1984) amendment, effective July 6, 1984, added subsection (h).

The 1985 amendment, effective July 1, 1985, rewrote the second and third paragraphs of subsection (h) and added subsection (i).

Session Laws 1985 (Reg. Sess., 1986), c. 859, s. 3, effective October 1, 1986, and applicable to persons released on parole on or after that date, substituted "G.S. 15A-1374(b)(6), (7), (8), (9), and (10) and G.S. 15A-1374(c)" for "G.S. 15A-1374(b)(6), (7), (8), (9), (10)" at the end of the second sentence of subsection (d).

Session Laws 1985 (Reg. Sess., 1986), c. 960, s. 2, effective July 10, 1986, and applicable to persons who are prisoners on or after July 10, 1986, added the first sentence of the last paragraph of subsection (h).

Session Laws 1985 (Reg. Sess., 1986), c. 1012, ss. 3 and 6, effective August 1, 1986, substituted "one hundred dollars (\$100.00)" for "fifty dollars (\$50.00)" in the first sentence of subsection (i) and added the last sentence of subsection (i).

Session Laws 1985 (Reg. Sess., 1986), c. 1014, s. 197(b), effective July 15, 1986, substituted the present second and third sentences of subsection (c) for the former second sentence thereof, pertaining to parole and termination of supervision of prisoners eligible for parole under § 148-4.1.

Session Laws 1987, c. 7, s. 5, effective March 11, 1987, in subsection (c), substituted "270 days" for "180 days" in the second sentence, and deleted a final sentence which read "In the case of an inmate eligible for parole under G.S. 148-4.1 who has 180 to 270 days remaining on the maximum sentence, the Parole Commission may simultaneously

parole and terminate supervision of the prisoner when the Secretary of Correction certifies that in his opinion the prisoner poses no threat to society and when the Commission finds that such action will not be incompatible with the public interest."

Session Laws 1987, c. 47, effective April 6, 1987, and applicable to all prisoners sentenced prior to, on, or after that date, added the present fourth paragraph of subsection (h).

Session Laws 1987, c. 783, s. 7, effective August 12, 1987, in paragraph (h)a as amended by Session Laws 1987, c. 47 inserted "or his probationary sentence was revoked in the same such session of court."

Session Laws 1987, c. 879, s. 1.2, effective August 14, 1987, amended Session Laws 1987, c. 7, ss. 3, 4, and 5 by substituting "reads as rewritten" for "is rewritten to read."

SUBCHAPTER XIV. CORRECTION OF ERRORS AND APPEAL.

ARTICLE 88.

Post-Trial Motions and Appeal.

§ 15A-1401. Post-trial motions and appeal.

CASE NOTES

Cited in *State v. White*, 74 N.C. App. 504, 328 S.E.2d 902 (1985).

ARTICLE 89.

Motion for Appropriate Relief and Other Post-Trial Relief.

§ 15A-1411. Motion for appropriate relief.

CASE NOTES

Court's Authority to Strike Guilty Plea. — Neither the statutory nor the case law empowers the trial court with the absolute discretion to strike a guilty plea once it has been unconditionally accepted and entered. Thus, a trial court's discretion to strike a guilty plea and set a case for trial derives, if at all, from its

comparable authority to overturn a jury verdict and order a new trial. *State v. Oakley*, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

Legal effect of arresting judgment is to vacate the verdict and sentence. The State may proceed against the defendants if it so desires, upon new and

sufficient bills of indictment. *State v. Goforth*, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

Judgment must be arrested when indictment fails to charge essential element of the offense. *State v. Goforth*, 65 N.C. App. 302, 309 S.E.2d 488 (1983).

Motion to Set Aside Verdict Is Addressed to Court's Discretion.

In accord with 1st paragraph in original. See *State v. Powell*, 74 N.C. App. 584, 328 S.E.2d 613 (1985).

Applied in *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

Cited in *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985); *Rook v. Rice*, 783 F.2d 401 (4th Cir. 1986).

§ 15A-1414. Motion by defendant for appropriate relief made within 10 days after verdict.

CASE NOTES

Any contradictions and discrepancies in the evidence are matters for the jury. *State v. Stanley*, 74 N.C. App. 178, 327 S.E.2d 902, cert. denied, 314 N.C. 546, 335 S.E.2d 318 (1985).

Discretion of Court. —

A motion under subdivision (b)(2) is addressed to the discretion of the trial court, and the ruling will not be disturbed on appeal absent an abuse of discretion. *State v. Stanley*, 74 N.C. App. 178, 327 S.E.2d 902, cert. denied, 314 N.C. 546, 335 S.E.2d 318 (1985); *State v. Ruiz*, 77 N.C. App. 425, 335 S.E.2d 32 (1985), cert. denied, 315 N.C. 395, 338 S.E.2d 885 (1986).

As a post-trial motion, the disposition of a motion for appropriate relief is subject to the sentencing judge's discretion and will not be overturned absent a showing of abuse of discretion. *State v. Arnette*, — N.C. App. —, 355 S.E.2d 498 (1987).

Refusal to Set Aside Verdict Within Court's Discretion. — A motion to set aside the verdict is a post-

trial motion pursuant to this section, the disposition of which is within the discretion of the trial court. Therefore, refusal to grant a motion to set aside the verdict is not error absent a showing of abuse of that discretion. *State v. Lilley*, 78 N.C. App. 100, 337 S.E.2d 89 (1985), discretionary review denied as to additional issues, 316 N.C. 199, 341 S.E.2d 582 (1986).

Trial court properly denied motion to set aside verdict under subsection (b)(2). — See *State v. Bates*, 313 N.C. 580, 330 S.E.2d 200 (1985).

Applied in *State v. Bean*, 66 N.C. App. 86, 310 S.E.2d 421 (1984); *State v. Essick*, 67 N.C. App. 697, 314 S.E.2d 268 (1984); *State v. Howard*, 70 N.C. App. 487, 320 S.E.2d 17 (1984); *State v. Acklin*, 71 N.C. App. 261, 321 S.E.2d 532 (1984); *State v. Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985); *State v. Greene*, 74 N.C. App. 21, 328 S.E.2d 1 (1985).

Cited in *State v. Leonard*, 74 N.C. App. 443, 328 S.E.2d 593 (1985).

§ 15A-1415. Grounds for appropriate relief which may be asserted by defendant after verdict and without limitation as to time.

Legal Periodicals. —

For note, "Prosecutor's Duty to Dis-

close Evidence," see 15 N.C. Cent. L.J. 128 (1984).

CASE NOTES

Granting of New Trial Is In, etc. —

In accord with main volume. See *State v. Oakley*, 75 N.C. App. 99, 330 S.E.2d 59 (1985); *State v. Hoots*, 76 N.C. App. 616, 334 S.E.2d 74 (1985).

And is not subject to review, etc. —

In accord with main volume. See *State v. Hoots*, 76 N.C. App. 616, 334 S.E.2d 74 (1985).

A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial judge and is not subject to review absent a showing of an abuse of discretion. *State v. Newell*, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

Showing Required for New Trial, etc. —

In accord with original. See *State v. Clark*, 65 N.C. App. 286, 308 S.E.2d 913 (1983), cert. denied, 310 N.C. 627, 315 S.E.2d 693 (1984); *State v. Stanley*, 74 N.C. App. 178, 327 S.E.2d 902, cert. denied, 314 N.C. 546, 335 S.E.2d 318

(1985); *State v. Hoots*, 76 N.C. App. 616, 334 S.E.2d 74 (1985).

New Evidence Must Not Merely Contradict or Discredit Testimony.

— In order for a court to grant a motion for a new trial it must appear by affidavit that, among other things, the new evidence does not merely tend to contradict, impeach or discredit the testimony of a former witness. *State v. Newell*, 82 N.C. App. 707, 348 S.E.2d 158 (1986).

Applied in *State v. McDowell*, 310 N.C. 61, 310 S.E.2d 301 (1984); *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985).

Stated in *State v. Wise*, 64 N.C. App. 108, 306 S.E.2d 569 (1983).

Cited in *State v. Baker*, 65 N.C. App. 430, 310 S.E.2d 101 (1983); *State v. Garner*, 67 N.C. App. 761, 313 S.E.2d 927 (1984); *State v. Jefferson*, 68 N.C. App. 725, 315 S.E.2d 744 (1984); *State v. Pait*, 81 N.C. App. 286, 343 S.E.2d 573 (1986); *State v. Martin*, 318 N.C. 648, 350 S.E.2d 63 (1986).

§ 15A-1416. Motion by the State for appropriate relief.

CASE NOTES

State had no statutory right to make motion to set aside judgment on basis of newly discovered evidence. But, because the trial court could have set aside the judgment on its own authority, allowing the State's motion was harmless error. *State v. Oakley*, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

The imposition of an excessive sen-

tence is not error from which the State may appeal within the meaning of subsection (a) of this section. *State v. Ransom*, 74 N.C. App. 716, 329 S.E.2d 673 (1985), aff'd, 80 N.C. App. 711, 343 S.E.2d 232 (1986).

Applied in *State v. Payne*, — N.C. —, 325 S.E.2d 205 (1985).

§ 15A-1417. Relief available.

CASE NOTES

No Authority To Grant Appropriate Relief Benefitting State. — The court, upon motion by the State, exceeded its authority in striking a guilty plea and setting the case for trial. The court did not have the authority to grant

"appropriate relief," pursuant to § 15A-1420(d), which benefitted the State. *State v. Oakley*, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

Applied in *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

§ 15A-1418. Motion for appropriate relief in the appellate division.

CASE NOTES

Applied in *State v. Wise*, 64 N.C. App. 108, 306 S.E.2d 569 (1983); *State v. Baker*, 65 N.C. App. 430, 310 S.E.2d 101 (1983); *State v. Payne*, 312 N.C. 647, 325 S.E.2d 205 (1985).

Cited in *State v. Johnson*, 309 N.C. 459, 306 S.E.2d 770 (1983); *State v. Jones*, 317 N.C. 487, 346 S.E.2d 657 (1986).

§ 15A-1419. When motion for appropriate relief denied.

CASE NOTES

Applied in *Richardson v. Turner*, 716 F.2d 1059 (4th Cir. 1983).

Cited in *Williams v. Gupton*, 627 F. Supp. 669 (W.D.N.C. 1986).

§ 15A-1420. Motion for appropriate relief; procedure.

CASE NOTES

Trial Judge's Findings, etc. —

The findings made by the trial court are binding if they are supported by any competent evidence, and the trial court's ruling on facts so supported may be disturbed only when there has been a manifest abuse of discretion, or when it is based on an error of law. *State v. Pait*, 81 N.C. App. 286, 343 S.E.2d 573 (1986).

No Authority To Grant Appropriate Relief Benefitting State. — The court, upon motion by the State, exceeded its authority in striking a guilty plea and setting the case for trial. The court did not have the authority to grant "appropriate relief," pursuant to subsection (d), which benefitted the State. *State v. Oakley*, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

In an evidentiary hearing for appropriate relief where the judge sits without a jury the moving party has the burden of proving by the preponder-

ance of the evidence every fact to support his motion. The court must make findings of fact in support of its ruling. *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1983).

In hearings before a judge sitting without a jury adherence to the rudimentary rules of evidence is desirable even in preliminary voir dire hearings. Such adherence invites confidence in the trial judge's findings. *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1983).

Applied in *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983); *State v. Wise*, 64 N.C. App. 108, 306 S.E.2d 569 (1983); *State v. Blandford*, 66 N.C. App. 348, 311 S.E.2d 338 (1984); *State v. Essick*, 67 N.C. App. 697, 314 S.E.2d 268 (1984); *State v. Payne*, 312 N.C. 647, 325 S.E.2d 205 (1985); *State v. Aiken*, 73 N.C. App. 487, 326 S.E.2d 919 (1985).

Cited in *State v. Martin*, 318 N.C. 648, 350 S.E.2d 63 (1986).

§ 15A-1422. Review upon appeal.

CASE NOTES

Applied in *State v. Aiken*, 73 N.C. App. 487, 326 S.E.2d 919 (1985). *Howard*, 70 N.C. App. 487, 320 S.E.2d 17 (1984); *State v. Pait*, 81 N.C. App.

Cited in *State v. Garner*, 67 N.C. App. 286, 343 S.E.2d 573 (1986).
761, 313 S.E.2d 927 (1984); *State v.*

ARTICLE 90.

*Appeals from Magistrates and District Court Judges.***§ 15A-1431. Appeals by defendants from magistrate and district court judge; trial de novo.**

CASE NOTES

Cited in *Field v. Sheriff of Wake County*, 654 F. Supp. 1367 (E.D.N.C. 1986).

§ 15A-1432. Appeals by State from district court judge.

(d) If the superior court finds that a judgment, ruling, or order dismissing criminal charges in the district court was in error, it must reinstate the charges and remand the matter to district court for further proceedings. The defendant may appeal this order to the appellate division as in the case of other orders of the superior court, including by an interlocutory appeal if the defendant, or his attorney, certifies to the superior court judge who entered the order that the appeal is not taken for the purpose of delay and if the judge finds the cause is appropriately justiciable in the appellate division as an interlocutory matter.

(1977, c. 711, s. 1; 1987, c. 398.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added "including by an interlocutory appeal if the defendant, or his attorney,

certifies to the superior court judge who entered the order that the appeal is not taken for the purpose of delay and if the judge finds the cause is appropriately justiciable in the appellate division as an interlocutory matter" at the end of the second sentence of subsection (d).

CASE NOTES

Applied in *State v. Rose*, 312 N.C. 441, 323 S.E.2d 339 (1984).

Cited in *State v. Henry*, 318 N.C. 408, 348 S.E.2d 593 (1986).

ARTICLE 91.

Appeal to Appellate Division.

§ 15A-1442. Grounds for correction of error by appellate division.

CASE NOTES

Cited in *State v. Roberts*, 82 N.C. App. 733, 348 S.E.2d 151 (1986).

§ 15A-1443. Existence and showing of prejudice.

Legal Periodicals. —

For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

For article, "an analysis of the new North Carolina evidence code," see 20 Wake Forest L. Rev. 1 (1984).

CASE NOTES

I. GENERAL CONSIDERATION.

Test for "Plain Error" Compared.

— The test for "plain error" places a much heavier burden upon the defendant than that imposed by this section upon defendants who have preserved their rights by timely objection. *State v. Walker*, 316 N.C. 33, 340 S.E.2d 80 (1986); *State v. Morgan*, 315 N.C. 626, 340 S.E.2d 84 (1986); *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986).

Burden of Proof. — On appeal the burden shifts: Once the motion to dismiss has been denied, defendant-appellant assumes the twin burdens of assuring that the record is properly made up and showing that error has occurred to his or her prejudice; if the record is deficient or silent upon a particular point, the reviewing court will presume that the trial judge acted correctly. *State v. White*, 77 N.C. App. 45, 334 S.E.2d 786, cert. denied, 315 N.C. 190, 337 S.E.2d 864 (1985).

Failure to Rule Formally on Objection to Evidence. — Ordinarily a party is entitled to a timely ruling on an objection to evidence. However, the failure to rule formally does not generally rise to the level of reversible error unless it is accompanied by other conduct of the trial judge evincing an opinion on the merits. *State v. Hicks*, 79 N.C. App. 599, 339 S.E.2d 806 (1986).

The erroneous admission of hearsay, like the erroneous admission of

other evidence, is not always so prejudicial as to require a new trial. *State v. Ramey*, 318 N.C. 457, 349 S.E.2d 566 (1986).

A trial judge's rulings with respect to the scope of cross-examination will not be disturbed unless the defendant can show that the verdict was improperly influenced thereby. This rule is consistent with the requirement of subsection (a) that a defendant has the burden of showing prejudice. *State v. Teefer*, — N.C. App. —, 355 S.E.2d 804 (1987).

Applied in *State v. Myers*, 309 N.C. 78, 305 S.E.2d 506 (1983); *State v. Bare*, 309 N.C. 122, 305 S.E.2d 513 (1983); *State v. Moore*, 309 N.C. 102, 305 S.E.2d 542 (1983); *State v. Cope*, 309 N.C. 47, 305 S.E.2d 676 (1983); *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983); *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1983); *State v. Jones*, 64 N.C. App. 505, 307 S.E.2d 823 (1983); *State v. Brown*, 64 N.C. App. 637, 308 S.E.2d 346 (1983); *State v. Maynard*, 65 N.C. App. 81, 308 S.E.2d 665 (1983); *State v. Isom*, 65 N.C. App. 223, 309 S.E.2d 283 (1983); *State v. Ingram*, 65 N.C. App. 585, 309 S.E.2d 576 (1983); *State v. Smith*, 310 N.C. 108, 310 S.E.2d 320 (1984); *State v. Stanley*, 310 N.C. 353, 312 S.E.2d 482 (1984); *State v. Colbert*, 65 N.C. App. 762, 310 S.E.2d 145 (1984); *State v. Godwin*, 67 N.C. App. 731, 314 S.E.2d 265 (1984); *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984); *State v. Toomer*, 311

N.C. 183, 316 S.E.2d 66 (1984); State v. Colbert, 311 N.C. 283, 316 S.E.2d 79 (1984); State v. Gonzalez, 311 N.C. 80, 316 S.E.2d 229 (1984); State v. Foust, 311 N.C. 351, 317 S.E.2d 385 (1984); State v. Lewis, 68 N.C. App. 575, 315 S.E.2d 766 (1984); State v. Miller, 69 N.C. App. 392, 317 S.E.2d 84 (1984); State v. Lassiter, 70 N.C. App. 731, 321 S.E.2d 175 (1984); State v. Joines, 312 N.C. 490, 322 S.E.2d 758 (1984); State v. Greenlee, 72 N.C. App. 269, 324 S.E.2d 48 (1985); State v. Hyman, 312 N.C. 601, 324 S.E.2d 264 (1985); State v. McCray, 312 N.C. 519, 324 S.E.2d 606 (1985); State v. Payne, 312 N.C. 647, 325 S.E.2d 205 (1985); State v. Johnson, 72 N.C. App. 512, 325 S.E.2d 253 (1985); State v. Oliver, 73 N.C. App. 118, 325 S.E.2d 682 (1985); State v. Horton, 73 N.C. App. 107, 326 S.E.2d 54 (1985); State v. Myers, 73 N.C. App. 650, 327 S.E.2d 276 (1985); State v. Durham, 74 N.C. App. 121, 327 S.E.2d 312 (1985); State v. Jenkins, 74 N.C. App. 295, 328 S.E.2d 460 (1985); State v. Burgess, 76 N.C. App. 534, 333 S.E.2d 563 (1985); State v. Watts, 77 N.C. App. 124, 334 S.E.2d 400 (1985); State v. Hayes, 314 N.C. 460, 334 S.E.2d 741 (1985); State v. Hensley, 77 N.C. App. 192, 334 S.E.2d 783 (1985); State v. White, 77 N.C. App. 45, 334 S.E.2d 786 (1985); State v. Watkins, 77 N.C. App. 325, 335 S.E.2d 232 (1985); State v. Head, 79 N.C. App. 1, 338 S.E.2d 908 (1986); State v. Satterfield, 316 N.C. 55, 340 S.E.2d 52 (1986); State v. Ledford, 315 N.C. 599, 340 S.E.2d 309 (1986); State v. Wrenn, 316 N.C. 141, 340 S.E.2d 443 (1986); State v. Gordon, 316 N.C. 497, 342 S.E.2d 509 (1986); State v. Allen, 317 N.C. 119, 343 S.E.2d 893 (1986); State v. Lipford, 81 N.C. App. 464, 344 S.E.2d 307 (1986); State v. Teasley, 82 N.C. App. 150, 346 S.E.2d 227 (1986); State v. Tucker, 317 N.C. 532, 346 S.E.2d 417 (1986); State v. Barber, 317 N.C. 502, 346 S.E.2d 441 (1986); State v. Acklin, 317 N.C. 677, 346 S.E.2d 481 (1986); State v. Wright, 82 N.C. App. 450, 346 S.E.2d 510 (1986); State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986); State v. Wingard, 317 N.C. 590, 346 S.E.2d 638 (1986); State v. Scott, 318 N.C. 237, 347 S.E.2d 414 (1986); State v. Ollis, 318 N.C. 370, 348 S.E.2d 777 (1986); State v. Brooks, 83 N.C. App. 179, 349 S.E.2d 630 (1986); State v. Aguillo, 318 N.C. 590, 350 S.E.2d 76 (1986); State v. Fisher, 318 N.C. 512, 350 S.E.2d 334 (1986); State v. Chul Yun Kim, 318 N.C. 614, 350 S.E.2d

347 (1986); State v. Daye, 83 N.C. App. 444, 350 S.E.2d 514 (1986); State v. Springer, 83 N.C. App. 657, 351 S.E.2d 120 (1986); State v. Mills, 83 N.C. App. 606, 351 S.E.2d 130 (1986); State v. Jenkins, 83 N.C. App. 616, 351 S.E.2d 299 (1986); State v. Kimbrell, 84 N.C. App. 59, 351 S.E.2d 801 (1987); State v. Worthington, — N.C. App. —, 352 S.E.2d 695 (1987); State v. Clark, — N.C. —, 353 S.E.2d 205 (1987); State v. Clemmons, — N.C. —, 353 S.E.2d 209 (1987); State v. Platt, — N.C. App. —, 354 S.E.2d 332 (1987); State v. Stocks, — N.C. —, 355 S.E.2d 492 (1987).

Quoted in State v. Maynard, 311 N.C. 1, 316 S.E.2d 197 (1984); State v. Heath, 316 N.C. 337, 341 S.E.2d 565 (1986); State v. Harper, 82 N.C. App. 398, 346 S.E.2d 223 (1986).

Stated in State v. Stills, 310 N.C. 410, 312 S.E.2d 443 (1984); State v. Dula, 67 N.C. App. 748, 313 S.E.2d 899 (1984).

Cited in State v. Whisenant, 308 N.C. 791, 303 S.E.2d 784 (1983); State v. Rothwell, 308 N.C. 782, 303 S.E.2d 798 (1983); State v. Jackson, 309 N.C. 26, 305 S.E.2d 703 (1983); State v. McDowell, 310 N.C. 61, 310 S.E.2d 301 (1984); State v. Jean, 310 N.C. 157, 311 S.E.2d 266 (1984); State v. Smith, 66 N.C. App. 570, 312 S.E.2d 222 (1984); State v. Willis, 67 N.C. App. 320, 313 S.E.2d 173 (1984); State v. Wilson, 311 N.C. 117, 316 S.E.2d 46 (1984); State v. Walden, 311 N.C. 667, 319 S.E.2d 577 (1984); State v. Whitley, 311 N.C. 656, 319 S.E.2d 584 (1984); State v. Clark, 314 N.C. 638, 336 S.E.2d 83 (1985); State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985); State v. Gregory, 78 N.C. App. 565, 338 S.E.2d 110 (1985); State v. Bush, 78 N.C. App. 686, 338 S.E.2d 590 (1986); State v. Hooper, 79 N.C. App. 93, 339 S.E.2d 70 (1986); State v. McClintick, 315 N.C. 649, 340 S.E.2d 41 (1986); State v. Riddick, 315 N.C. 749, 340 S.E.2d 55 (1986); State v. DeLeonardo, 315 N.C. 762, 340 S.E.2d 350 (1986); State v. Gardner, 315 N.C. 444, 340 S.E.2d 701 (1986); State v. Triplett, 316 N.C. 1, 340 S.E.2d 736 (1986); State v. Woods, 316 N.C. 344, 341 S.E.2d 545 (1986); State v. Welch, 316 N.C. 578, 342 S.E.2d 789 (1986); State v. Barts, 316 N.C. 666, 343 S.E.2d 828 (1986); State v. Stevenson, 81 N.C. App. 409, 344 S.E.2d 334 (1986); State v. Froneberger, 81 N.C. App. 398, 344 S.E.2d 344 (1986); State v. West, 317 N.C. 219, 345 S.E.2d 186 (1986); State v. Mason, 317 N.C. 283, 345 S.E.2d 195

(1986); *State v. Mitchell*, 317 N.C. 661, 346 S.E.2d 458 (1986); *State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986); *State v. McKoy*, 317 N.C. 519, 347 S.E.2d 374 (1986); *State v. Joplin*, 318 N.C. 126, 347 S.E.2d 421 (1986); *State v. Roberts*, 82 N.C. App. 733, 348 S.E.2d 151 (1986); *State v. Lilley*, 318 N.C. 390, 348 S.E.2d 788 (1986); *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986); *State v. Williams*, 319 N.C. 73, 352 S.E.2d 428 (1987); *State v. Stanton*, — N.C. —, 353 S.E.2d 385 (1987).

II. PREJUDICIAL ERROR.

When Error Not Relating to Constitutional Rights Is Prejudicial. —

Errors relating to rights that do not arise under the federal Constitution are prejudicial when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at trial. *State v. Freeland*, 316 N.C. 13, 340 S.E.2d 35 (1986); *State v. Gardner*, 316 N.C. 605, 342 S.E.2d 872 (1986).

All Circumstances Considered. —

Not every impropriety on the part of the judge results in prejudicial error; whether the judge's actions amount to reversible error is a question to be considered in light of all of the circumstances. *State v. Heath*, 77 N.C. App. 264, 335 S.E.2d 350 (1985), rev'd on other grounds, 316 N.C. 337, 341 S.E.2d 565 (1986).

Burden, etc. —

The burden is on the defendant to show prejudice. *State v. Heath*, 77 N.C. App. 264, 335 S.E.2d 350 (1985), rev'd on other grounds, 316 N.C. 337, 341 S.E.2d 565 (1986).

The defendant bears the additional burden, when challenging a jury instruction, to show that the jury was misled or misinformed by the charge as given, or that a different result would have been reached had the requested instruction been given. *State v. Carson*, 80 N.C. App. 620, 343 S.E.2d 275 (1986).

Exposure of Jury to Evidence of Guilt of Alleged Principals. — Exposure of the jury to strong and virtually irrebuttable evidence that the alleged principals were convicted of the same crimes charged against defendant upon the state's theory that he participated in the crimes as an aider and abettor was not harmless beyond a reasonable doubt. *State v. Brown*, — N.C. —, 354 S.E.2d 225 (1997).

Introduction of Evidence "Out of

Turn". — Although the trial court committed error by allowing the State to introduce evidence of defendant's history of prior criminal activity "out of turn," the error was not prejudicial under the circumstances. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

III. HARMLESS ERROR.

Admission of Improper Testimony, etc.

Where the evidence, including the implication of defendant's own admission, pointed overwhelmingly to his culpability in murder, any error in admitting that portion of defendant's statement in which he asserted his constitutional right to remain silent did not contribute to his conviction and was harmless beyond a reasonable doubt. *State v. Hooper*, 318 N.C. 680, 351 S.E.2d 286 (1987).

Erroneous admission of hearsay, like erroneous admission of other evidence, is not always so prejudicial as to require a new trial. Unless such error infringes upon a criminal defendant's constitutional rights, the defendant has the burden of showing that he was prejudiced by the error and that there was a reasonable possibility that a different result would have been reached at trial if the error had not been committed. *State v. Sills*, 311 N.C. 370, 317 S.E.2d 379 (1984).

Prosecutor's Question as to Details of Prior Conviction. — Where defendant testified on direct examination that he had been convicted of assault, the prosecutor's question as to whether the assault involved a shooting was basically no more than an inquiry into whether the conviction was, in reality, one for a more serious offense, i.e., assault with a deadly weapon, and even if the inquiry was error, the error was not of such magnitude as to require a new trial under the test of prejudicial error contained in subsection (a). *State v. Rathbone*, 78 N.C. App. 58, 336 S.E.2d 702 (1985).

IV. RIGHTS UNDER U.S. CONSTITUTION.

Reading of Search Warrant Affidavit to Jury. — The trial court committed reversible error in permitting the witness in cocaine prosecution to read the entire search warrant affidavit to the jury, because the statements and al-

legations contained in the affidavit were hearsay statements which deprived the accused of his rights of confrontation

and cross-examination. *State v. Edwards*, 315 N.C. 304, 337 S.E.2d 508 (1985).

§ 15A-1444. When defendant may appeal; certiorari.

CASE NOTES

The Fair Sentencing Act does not allow appeal of a presumptive sentence as of right. *State v. Cain*, — N.C. App. —, 338 S.E.2d 898 (1986).

Appeal under subsection (a)(1), etc. —

Where defendant was entitled to appeal as of right only in the case in which the sentence exceeds the presumptive, the court neither erred nor abused its discretion in refusing to allow him to appeal in forma pauperis in the other cases. *State v. Benfield*, 76 N.C. App. 453, 333 S.E.2d 753 (1985).

Applied in *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983); *State v. Thompson*, 64 N.C. App. 354, 307 S.E.2d 397 (1983); *State v. Aldridge*, 67 N.C. App. 655, 314 S.E.2d 139 (1984); *State v. Howard*, 70 N.C. App. 487, 320 S.E.2d 17 (1984); *State v. Dickey*, 71 N.C. App. 225, 321 S.E.2d 492 (1984); *State v. Johnson*, 71 N.C. App. 607, 322 S.E.2d 810 (1984); *State v. Ford*, 71 N.C. App. 748, 323 S.E.2d 358 (1984); *State v.*

Heath, 77 N.C. App. 264, 335 S.E.2d 350 (1985).

Cited in *State v. Miller*, 64 N.C. App. 618, 307 S.E.2d 843 (1983); *State v. Benbow*, 309 N.C. 538, 308 S.E.2d 647 (1983); *State v. Hinnant*, 65 N.C. App. 130, 308 S.E.2d 732 (1983); *State v. Smith*, 65 N.C. App. 420, 309 S.E.2d 1 (1983); *State v. Williams*, 65 N.C. App. 472, 310 S.E.2d 83 (1983); *State v. Jones*, 66 N.C. App. 274, 311 S.E.2d 351 (1984); *State v. Thompson*, 66 N.C. App. 679, 312 S.E.2d 212 (1984); *State v. Coker*, 312 N.C. 432, 323 S.E.2d 343 (1984); *State v. Collier*, 72 N.C. App. 508, 325 S.E.2d 256 (1985); *State v. Williamson*, 72 N.C. App. 657, 326 S.E.2d 37 (1985); *State v. Pait*, 81 N.C. App. 286, 343 S.E.2d 573 (1986); *Tarantino v. North Carolina*, 639 F. Supp. 661 (W.D.N.C. 1986); *State v. Henry*, 318 N.C. 408, 348 S.E.2d 593 (1986); *State v. Thompson*, 318 N.C. 395, 348 S.E.2d 798 (1986); *State v. Wright*, — N.C. —, 353 S.E.2d 214 (1987); *State v. Parker*, — N.C. —, 355 S.E.2d 489 (1987).

§ 15A-1445. Appeal by the State.

CASE NOTES

I. GENERAL CONSIDERATION.

State had no statutory right to make motion to set aside judgment on basis of newly discovered evidence. But, because the trial court could have set aside the judgment on its own authority, allowing the State's motion was harmless error. *State v. Oakley*, 75 N.C. App. 99, 330 S.E.2d 59 (1985).

Applied in *State v. Baker*, 65 N.C. App. 430, 310 S.E.2d 101 (1983).

Cited in *State v. Adams*, 67 N.C. App. 116, 312 S.E.2d 498 (1984); *State v. Ransom*, 74 N.C. App. 716, 329 S.E.2d 673 (1985); *State v. Harvey*, 78 N.C. App. 235, 336 S.E.2d 857 (1985); *State v. Brown*, 81 N.C. App. 281, 343 S.E.2d 553

(1986); *State v. Tarantino*, 83 N.C. App. 473, 350 S.E.2d 864 (1986).

II. NONAPPEALABLE ORDERS AND JUDGMENTS.

No Right to Appeal from Dismissal, etc. — A motion to dismiss pursuant to § 15A-1227 tests the sufficiency of the evidence to sustain a conviction and, in that respect, is identical to a motion for judgment as in the case of nonsuit under § 15-173. Therefore, following such dismissal defendant cannot again be placed in jeopardy upon these same charges, and the State has no right of appeal from the judgment entered. *State v. Ausley*, 78 N.C. App. 791, 338 S.E.2d 547 (1986).

§ 15A-1446. Requisites for preserving the right to appellate review.

(b) Failure to make an appropriate and timely motion or objection constitutes a waiver of the right to assert the alleged error upon appeal, but the appellate court may review such errors affecting substantial rights in the interest of justice if it determines it appropriate to do so.

(1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 28; 1983 (Reg. Sess., 1984), c. 1037, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1983 (Reg. Sess., 1984) amendment, effective July 1, 1984, inserted "affecting sub-

stantial rights" in subsection (b).

Legal Periodicals. —

For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

CASE NOTES

Subdivision (d)(6) Unconstitutional. —

In accord with main volume. See *State v. O'Neal*, 77 N.C. App. 600, 335 S.E.2d 920 (1985).

Construction with Rule 10 of Appellate Procedure Rules. — When a conflict arises between a subsection of this section and Rule 10 of the Rules of Appellate Procedure, the Rules of Appellate Procedure should control. *State v. O'Neal*, 77 N.C. App. 600, 335 S.E.2d 920 (1985).

To the extent that subsection (d)(5) is inconsistent with N.C.R.App.P. 10(b)(3), the statute must fail. *State v. Stocks*, — N.C. —, 355 S.E.2d 492 (1987).

Failure to Note Exceptions, etc. —

Editor's Note. — *The third paragraph under this catchline in the main volume is derived from the case of State v. McDougall*, 308 N.C. 1, 301 S.E.2d 308 (1983).

Where there was no improperly overruled objection to the witness's competence due to defendant's failure to object to the court's finding that she was competent, the defendant was precluded from using the exception in subdivision (d)(9) to assign error to her testimony on the ground that she was incompetent.

State v. Gordon, 316 N.C. 497, 342 S.E.2d 509 (1986).

Assignment of error dismissed for failure to make timely objection. — See *State v. Moore*, 75 N.C. App. 543, 331 S.E.2d 251, cert. denied, 315 N.C. 188, 337 S.E.2d 862 (1985).

Applied in *State v. Queen*, 65 N.C. App. 820, 310 S.E.2d 153 (1984); *State v. Gonzalez*, 311 N.C. 80, 316 S.E.2d 229 (1984); *State v. Dorsey*, 71 N.C. App. 435, 322 S.E.2d 405 (1984); *State v. Higginbottom*, 312 N.C. 760, 324 S.E.2d 834 (1985); *State v. Brooks*, 72 N.C. App. 254, 324 S.E.2d 854 (1985); *State v. Jones*, 72 N.C. App. 610, 325 S.E.2d 309 (1985); *State v. Jackson*, 77 N.C. App. 491, 335 S.E.2d 903 (1985); *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985); *State v. Bunn*, 79 N.C. App. 480, 339 S.E.2d 673 (1986); *State v. West*, 317 N.C. 219, 345 S.E.2d 186 (1986); *State v. Jordan*, 319 N.C. 98, 352 S.E.2d 672 (1987).

Quoted in *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983).

Stated in *State v. Thompson*, 64 N.C. App. 354, 307 S.E.2d 397 (1983).

Cited in *State v. Gonzalez*, 311 N.C. 80, 316 S.E.2d 229 (1984); *State v. Jolley*, 312 N.C. 296, 321 S.E.2d 883 (1984).

§ 15A-1448. Procedures for taking appeal.

- (a) Time for Entry of Appeal; Jurisdiction over the Case. —
- (1) A case remains open for the taking of an appeal to the appellate division for a period of 10 days after the entry of judgment.
 - (2) When a motion for appropriate relief is made during the 10-day period, the case remains open for the taking of an appeal until the expiration of 10 days after the court has ruled on the motion.
 - (3) The jurisdiction of the trial court with regard to the case is divested, except as to actions authorized by G.S. 15A-1453, when notice of appeal has been given and the period described in (1) and (2) has expired.
 - (4) Repealed by Session Laws 1987, c. 624, effective October 1, 1987.
 - (5) The right to appeal is not waived by withdrawal of an appeal if the appeal is reentered within the time specified in (1) and (2).
 - (6) The right to appeal is not waived by compliance with all or a portion of the judgment imposed. If the defendant appeals, the court may enter appropriate orders remitting any fines or costs which have been paid. The court may delay the remission pending the determination of the appeal.
- (1977, c. 711, s. 1; 1977, 2nd Sess., c. 1147, s. 29; 1987, c. 624.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, deleted subdivision (a)(4), which read "If

there has been no ruling by the trial judge on a motion for appropriate relief within 10 days after motion for such relief has been made, the motion shall be deemed denied."

CASE NOTES

Applied in *State v. Craver*, 70 N.C. App. 555, 320 S.E.2d 431 (1984); *State v.*

Aiken, 73 N.C. App. 487, 326 S.E.2d 919 (1985).

SUBCHAPTER XV. CAPITAL PUNISHMENT.

ARTICLE 100.

Capital Punishment.

§ 15A-2000. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

Legal Periodicals. —

For survey of 1982 law on criminal procedure, see 61 N.C.L. Rev. 1090 (1983).

For note on jury discretion in capital

cases in light of *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 103 S. Ct. 474 (1982), see 5 Camp. L. Rev. 451 (1983).

For comment on limitations upon the

jury's discretion in capital punishment sentencing in light of *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203 (1982), see 19 Wake Forest L. Rev. 621 (1983).

For note discussing North Carolina's capital sentencing procedure, see 62 N.C.L. Rev. 833 (1984).

For article, "Prosecutorial Abuse of Peremptory Challenges in Death Penalty Litigation: Some Constitutional and

Ethical Considerations," see 8 Campbell L. Rev. 71 (1985).

For article, "Rummaging Through a Wilderness of Verbiage, The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

For article, "The 'Especially Heinous' Aggravating Circumstance In Capital Cases — The Standardless Standard," See 64 N.C.L. Rev. 941 (1986).

CASE NOTES

I. GENERAL CONSIDERATION.

Constitutionality. —

In accord with 4th paragraph in original. See *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983); *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984); *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984), cert. denied, 471 U.S. 1030, 105 S. Ct. 2052, 85 L. Ed. 2d 324 (1985).

Subsection (d) of this section is not unconstitutional. *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984), cert. denied, 471 U.S. 1120, 105 S. Ct. 2368, 86 L. Ed. 2d 267 (1985).

Subdivision (e)(9) is constitutional on its face. *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985).

The North Carolina capital murder scheme is not unconstitutional under *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), as permitting subjective discretion and discrimination in imposing the death penalty. *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984).

The United States Supreme Court says the federal Constitution does not prohibit the use of absolute prosecutorial discretion in determining which cases to prosecute for first-degree murder so long as such discretionary decisions are not based on race, religion, or some other impermissible classification, and the North Carolina Supreme Court is not inclined to interpret the Constitution to require more. If prosecutors are to be "guided" in the exercise of this kind of discretion, it is the province of the legislature and not the Court to so provide. *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984).

The Supreme Court would decline to reconsider its prior holdings upholding the constitutionality of the death pen-

alty statute. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

The North Carolina jury process in first degree murder cases is constitutional. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986).

Death penalty statute does not violate constitutional right to privacy. *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983).

Procedure Held Constitutionally Adequate. — Procedure during sentencing phase, whereby the jury was instructed to determine (1) whether there were aggravating circumstances; (2) whether the aggravating circumstances were sufficient to warrant a death sentence; (3) whether there were mitigating circumstances; and (4) whether the aggravating circumstances outweighed the mitigating ones, satisfied all requirements to which defendant was constitutionally entitled. *Rook v. Rice*, 783 F.2d 401 (4th Cir.), cert. denied, — U.S. —, 106 S. Ct. 3315, 92 L. Ed. 2d 745 (1986).

"Death Qualified" Jury Constitutional. —

The current jury selection process in this State in first-degree murder cases is constitutional. See *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984).

Defendant was not deprived of her right to a fair trial because her jury was "death qualified." *State v. Spangler*, 314 N.C. 374, 333 S.E.2d 722 (1985).

Supreme Court would decline to reconsider its holdings on the matter of death-qualifying jury. *State v. Woods*, 316 N.C. 344, 341 S.E.2d 545 (1986).

Intent Requirement of Enmund v. Florida. — Under *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), which construed and applied the Eighth Amendment, before he

may be sentenced to death, a participant must have killed or attempted to kill or intended or contemplated that life would be taken. This requirement is met if the defendant intended or contemplated that lethal force would be used if it became necessary to effectuate the crime. *State v. Reese*, — N.C. —, 353 S.E.2d 352 (1987).

For discussion of submission to the jury of the issues enunciated in *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), before the jury considered the issues mandated by this section in a case in which defendant had participated in the crime with several others, see *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987).

Discretion of Court in Questioning of Jury. — Both the State and defendant have a right to question prospective jurors about their views on the death penalty so as to insure a fair and impartial verdict. However, the trial court is vested with broad discretion in controlling the extent and manner of the inquiry into prospective jurors' qualifications in a capital case. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986).

It is not necessary that a capital defendant be the only person who delivered fatal blows to the victim, in order for him to be executed. It is enough if the capital defendant is one of two or more who delivered fatal blows. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987).

For discussion of whether codefendants who are tried jointly should receive joint or separate sentencing trial, see *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983).

Exchange of Jurors for Sentencing Phase Based on Their Convictions as to Death Penalty. — Subdivision (a)(2) of this section permits alternate jurors to serve during the sentencing phase in extraordinary circumstances involving the death, incapacitation or disqualification of an empaneled juror, but does not provide for the exchange of jurors for the sentencing phase based upon their convictions concerning the death penalty. *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983).

Selecting a jury composed both of those opposed and unopposed to capital punishment for the purpose of determining guilt and then, at the sentencing phase, replacing those opposed by alternates who are unopposed to the death

penalty contravenes subdivision (a)(2) of this section, which contemplates that the same jury which determines guilt will recommend the sentence. *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983).

Allowing jurors opposed to capital punishment to serve during the guilt-innocence determination phase and then replacing them at the sentencing phase would violate subdivision (a)(2) of this section, which contemplates that the same jury which determines guilt will also recommend the sentence to be imposed. *State v. Barts*, 316 N.C. 666, 343 S.E.2d 828 (1986).

Jury's Consideration Not to Be Restricted. — The jury's consideration of any factor relevant to the circumstances of the crime or the character of the defendant may not be restricted. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Defendant Not Entitled To Make Both First and Last Final Argument. — While clearly providing the defendant with the opportunity to make the final argument at the penalty phase of the trial, neither subsection (a)(4) nor any other statutory provision gave the defendant the right to make both the first and last arguments. Furthermore, even had this been error, the fact that the defendant received a life sentence rather than the death penalty made the error harmless. *State v. Wilson*, 315 N.C. 516, 330 S.E.2d 450 (1985).

Informing the jury of the effect, etc. —

Statement that a sentence of life imprisonment would be imposed upon the defendant in the event that the jury was unable to reach unanimous agreement on the proper sentence would be improper, because it would be of no assistance to the jury and would invite the jury to escape its responsibility to recommend the sentence to be imposed. This is true whether such a statement is read by counsel or is contained within the instructions of the trial court. *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986).

Instruction on Weighing Factors in Aggravation and Mitigation. — Instruction that if the jury found that aggravating circumstances outweighed mitigating circumstances, and that the aggravating circumstances were sufficiently substantial to call for imposition of the death penalty, then it would be

the jury's duty to recommend that defendant be sentenced to death is not erroneous. *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986).

Applied in *State v. Abdullah*, 309 N.C. 63, 306 S.E.2d 100 (1983); *State v. Heptinstall*, 309 N.C. 231, 306 S.E.2d 109 (1983); *State v. Watson*, 310 N.C. 384, 312 S.E.2d 448 (1984); *Keeten v. Garrison*, 578 F. Supp. 1164 (W.D.N.C. 1984).

Stated in *Hutchins v. Garrison*, 724 F.2d 1425 (4th Cir. 1983); *Keeten v. Garrison*, 742 F.2d 129 (4th Cir. 1984).

Cited in *State v. Myers*, 309 N.C. 78, 305 S.E.2d 506 (1983); *State v. McDowell*, 310 N.C. 61, 310 S.E.2d 301 (1984); *State v. Jenkins*, 311 N.C. 194, 317 S.E.2d 345 (1984); *State v. McDonald*, 312 N.C. 264, 321 S.E.2d 849 (1984); *State v. Westmoreland*, 314 N.C. 442, 334 S.E.2d 223 (1985); *State v. Jones*, 314 N.C. 644, 336 S.E.2d 385 (1985); *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986); *State v. King*, 316 N.C. 78, 340 S.E.2d 71 (1986); *State v. Sidden*, 315 N.C. 539, 340 S.E.2d 340 (1986); *State v. Miller*, 316 N.C. 273, 341 S.E.2d 531 (1986); *State v. Massey*, 316 N.C. 558, 342 S.E.2d 811 (1986); *State v. Jackson*, 317 N.C. 1, 343 S.E.2d 814 (1986); *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986); *State v. Moore*, 317 N.C. 275, 345 S.E.2d 217 (1986); *State v. Blake*, 317 N.C. 632, 346 S.E.2d 399 (1986); *State v. Gambrell*, 318 N.C. 249, 347 S.E.2d 390 (1986).

II. REVIEW OF JUDGMENT AND SENTENCE.

Test for Prejudicial Error in Submission of Aggravating Circumstances to Jury. — Where there is a reasonable possibility that the erroneous submission of an aggravating circumstance tipped the scales in favor of the jury finding that the aggravating circumstances were sufficiently substantial to justify imposition of the death penalty, the test for prejudicial error has been met. *State v. Quesinberry*, — N.C. —, 354 S.E.2d 446 (1987).

The language of subdivision (d)(2) of this section is mandatory. *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

The responsibility placed upon the State by subdivision (d)(2) is as serious as any responsibility placed upon an appellate court. *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

Purpose of Subsection (d). —

In accord with 1st paragraph in original. See *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984).

The purpose of proportionality review is to serve as a check against the capricious or random imposition of the death penalty. *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

A proportionality review is to be undertaken only in cases where both phases of the trial of a defendant have been found to be without error. Only then can the court have before it the true decision of the jury to which great deference should be accorded. *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

For discussion of proportionality review, see *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983); *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

The Supreme Court will not necessarily feel bound during its proportionality review to give a citation to every case in the pool of "similar cases" used for comparison. The court has chosen to use all of these "similar cases" for proportionality review purposes. *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

"Finding" Required by Subdivision (d)(2). — Subdivision (d)(2) of this section requires the Supreme Court to determine, as a matter of law, whether (1) the record supports the jury's finding of any aggravating circumstance upon which the trial court based its sentence of death, (2) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, or (3) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases; it neither contemplates nor requires the court to make factual findings. *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984), cert. denied, 471 U.S. 1120, 105 S. Ct. 2368, 86 L. Ed. 2d 267 (1985).

While subdivision (d)(2) of this section uses the word "finding" in prescribing the Supreme Court's review of death sentences, a "finding of fact" as that term is generally understood is not contemplated. Rather, "finding" means a "determination" or a "conclusion." *State v. Lawson*, 310 N.C. 632, 314 S.E.2d 493 (1984), cert. denied, 471 U.S. 1120, 105 S. Ct. 2368, 86 L. Ed. 2d 267 (1985).

Court did not err in permitting murder case to be tried capitally and in permitting death qualification of the jury on grounds that the evidence was

insufficient to obtain either a murder conviction or the death penalty. *State v. Moxley*, 78 N.C. App. 551, 338 S.E.2d 122 (1985), cert. denied, 316 N.C. 384, 342 S.E.2d 904 (1986).

Facts held to support the jury's decision to recommend a sentence of death. *State v. Gladden*, — N.C. —, 340 S.E.2d 673 (1986).

In light of the horrendous nature of the crimes perpetrated upon victim by defendant, who was found guilty of abducting, beating, raping and running over victim with an automobile, the death sentence was not excessive as applied to him. *Rook v. Rice*, 783 F.2d 401 (4th Cir. 1986), cert. denied, — U.S. —, 106 S. Ct. 3315, 92 L. Ed. 2d 745 (1986).

Pool of "Similar Cases" Used for Comparison. — In comparing "similar cases" for purposes of proportionality review, the Supreme Court uses as a pool for comparison purposes all cases arising since the effective date of the capital punishment statute, June 1, 1977, which have been tried as capital cases and reviewed on direct appeal by the Supreme Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time. *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983); *State v. Hill*, 311 N.C. 465, 319 S.E.2d 163 (1984); *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Citation to Every "Similar Case" Not Necessary. — The Supreme Court will not necessarily feel bound during its proportionality review to give a citation to every case in the pool of "similar cases" used for comparison. *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983).

Death sentence held excessive and disproportionate. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986).

In a robbery murder case which rested solely on a felony murder theory, where the jury found that the murder was "especially heinous," but also found one or more mitigating circumstances, and where defendant's accomplice had previously been given life imprisonment, as a matter of law the death sentence given to defendant was disproportionate within the meaning of this section, and the Supreme Court would therefore vacate same and order instead that

defendant be sentenced to life imprisonment. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987).

III. AGGRAVATING CIRCUMSTANCES.

A. In General.

Constitutionality of Considering Pecuniary Gain. — The fact that pecuniary gain may be considered as an aggravating circumstance in a robbery-murder case does not constitute a violation of the Eighth Amendment. *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986).

State May Only Rely on Subsection (e), etc. —

In accord with 3rd paragraph in bound volume. See *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985).

Indictment Need Not List Aggravating Circumstances. —

In accord with bound volume. See *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985).

Only Statutory Circumstances May Be Considered. — A jury considering the sentence in a capital case in North Carolina may consider only statutory aggravating circumstances. *Barfield v. Harris*, 719 F.2d 58 (4th Cir. 1983), cert. denied, 467 U.S. 1210, 104 S. Ct. 2401, 81 L. Ed. 2d 357, rehearing denied, — U.S. —, 105 S. Ct. 28, 82 L. Ed. 2d 920 (1984).

Test of When Aggravating, etc. —

It is error to submit the underlying felony as an aggravating circumstance during the sentencing phase of the trial for a capital crime when felony murder is the theory under which defendant was convicted. *State v. Jackson*, 309 N.C. 26, 305 S.E.2d 703 (1983).

The prosecution must be permitted to present any competent, relevant evidence relating to the defendant's character or record which will substantially support the imposition of the death penalty, so as to avoid an arbitrary or erratic imposition of the death penalty. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Evidence of Violence Despite Stipulation to Same. — The prosecution may establish the use or threat of violence to the person in the commission of a prior felony by the testimony of witnesses, notwithstanding defendant's stipulation of the record of conviction,

even where defendant was prepared to stipulate not just to the existence of convictions, but also to the fact that each involved the use or threat of violence. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Perjury as Aggravating Factor. — The trial court did not err in finding as an aggravating factor as to armed robbery conviction that defendant took the stand and under oath repudiated his acknowledged wrongdoing, where the evidence established by a preponderance that the defendant committed perjury in so doing. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Need for Deterrence and That Lesser Sentence Would Depreciate Seriousness May Not Be Considered.

— It is error for the trial judge to find as aggravating factors that the sentence imposed was necessary to deter others, and that a lesser sentence would unduly depreciate the seriousness of the crime. These two factors fall within the exclusive realm of the Legislature and were presumably considered in determining the presumptive sentence for this offense. While both factors serve as legitimate purposes for imposing an active sentence, neither may form the basis for increasing or decreasing a presumptive term because neither relates to the character or conduct of the offender. *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983).

Redundant Aggravating Factors in Robbery-Murder Case. — In the particular context of a premeditated and deliberate robbery-murder where evidence is presented that the robbery was attempted or effectuated for pecuniary gain, the submission of both the aggravating factors enumerated in subdivisions (e)(5) and (6) is redundant and should be regarded as surplusage. Therefore it is error to submit both of these aggravating factors to the jury. *State v. Quesinberry*, — N.C. —, 354 S.E.2d 446 (1987).

B. Prior Convictions.

Methods of Proof. — Prior convictions may be proved by stipulation or by original certified copy of the court record, not that they must be. The statute does not preclude other methods of proof. *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983).

The preferred method for proving a prior conviction includes the introduction of the judgment itself into evidence. *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984).

C. Avoiding Arrest or Escaping Custody.

Mere Fact of Death, etc. —

While the fact that a killing was committed to avoid a lawful arrest may be a proper aggravating factor where there is competent evidence that the killing was committed for this purpose, such fact must be supported by evidence to that effect. Thus, it was not properly submitted where the only evidence relied upon to support this factor was the killing itself. *State v. Reese*, — N.C. —, 353 S.E.2d 352 (1987).

Prosecutor's Insinuations Held Improper. — The prosecutor's insinuations in argument at the close of the sentencing phase of defendant's capital case that victim was killed in order to prevent her from identifying the perpetrators of the robbery were improper, where the prosecution presented absolutely no evidence whatsoever which showed that victim's killing was motivated by a desire to eliminate a potential witness, and where such a contention was not a reasonable inference from the facts which were introduced. *State v. Williams*, 317 N.C. 474, 346 S.E.2d 405 (1986).

D. Felony Murder.

Factor May Not Be Submitted If, etc.

The submission of the aggravating factor that the killing was committed during an armed robbery was erroneous, where the theory of premeditation and deliberation was not properly before the jury, and defendant was properly convicted only on the theory of felony murder. *State v. Reese*, — N.C. —, 353 S.E.2d 352 (1987).

E. Especially Heinous, Atrocious, or Cruel Act.

Not Unconstitutionally Vague. —

The aggravating factor of especially heinous, atrocious or cruel is not unconstitutionally vague on its face as construed and applied in North Carolina and under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. *State v. Boyd*, 311

N.C. 408, 319 S.E.2d 189 (1984), cert. denied, 471 U.S. 1030, 105 S. Ct. 2052, 85 L. Ed. 2d 342 (1985).

Propriety of Submitting, etc. —

To submit the aggravating factor under subdivision (e)(9) to a jury, the capital offense must not be merely heinous, atrocious, or cruel; it must be especially heinous, atrocious, or cruel. The defendant's acts must be characterized by excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects not normally present in a first-degree murder case. *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984).

Aggravating factor that the killing was especially heinous, atrocious or cruel is appropriate when the killing demonstrates an unusual depravity of mind on the part of the defendant beyond that normally present in first-degree murder. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986); *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, cert. denied, — U.S. —, 107 S. Ct. 241, 93 L. Ed. 2d 165 (1986).

The aggravating factor that the killing was especially heinous, atrocious or cruel is properly submitted where there is evidence that the killing involved a prolonged death or was committed in a fashion beyond that necessary to effect death. *State v. Reese*, — N.C. —, 353 S.E.2d 352 (1987).

And Is Not a "Catchall" Provision. —

In accord with original. See *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983).

Subdivision (e)(9) Not Applicable to Every Homicide. —

In accord with 1st and 2nd paragraphs in original. See *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984).

In accord with 2nd paragraph in main volume. See *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986); *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, cert. denied, — U.S. —, 107 S. Ct. 241, 93 L. Ed. 2d 165 (1986).

Although every murder may be characterized as heinous, atrocious, and cruel, this aggravating factor is not to be applied in every first-degree murder case, but only in cases in which the first-degree murder committed was especially heinous, especially atrocious, or especially cruel. *State v. Brown*, 315 N.C. 40,

337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Facts as a Whole Must Be Considered. — The cruelty and brutality of a particular crime is determined by looking at the facts as a whole. *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986).

There are two types of murder which would warrant the submission of the especially heinous, atrocious, or cruel aggravating circumstance to the jury. One type involved killings which are physically agonizing for the victim or which were in some other way dehumanizing. The other type consists of those killings which are less violent, but involve infliction of psychological torture by leaving the victim in his last moments aware of but helpless to prevent impending death. *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984).

The North Carolina Supreme Court declined to limit the definition of an especially heinous, atrocious or cruel murder to include only those which involve physical injury or torture prior to death. The court upheld the submission of this aggravating circumstance even though the evidence did not establish at what point during a brutal attack the victim's death occurred. *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

Sufficiency of Evidence Supporting Finding of Especially Heinous, Atrocious, or Cruel Act. — In determining whether the evidence is sufficient to support a finding of essential facts which would support a determination that a murder was especially heinous, atrocious, or cruel the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Hamlet*, 312 N.C. 162, 321 S.E.2d 837 (1984).

Evidence depicting the slow and agonizing demise, etc. —

Where deceased died as a result of being battered to death by what can only have been a prolonged series of blows, blows with a cast-iron skillet so severe as to fracture her skull, neck, jaws, and collarbone and to cause her skull to be pushed into her brain, the severity and the brutality of the numerous wounds inflicted amply justified submission of this aggravating circumstance to the

jury. *State v. Huffstetler*, 312 N.C. 92, 322 S.E.2d 110 (1984), cert. denied, 471 U.S. 1009, 105 S. Ct. 1877, 85 L. Ed. 2d 169 (1985).

Not Limited to Physical Injury or Torture. — The North Carolina Supreme Court has declined to limit the interpretation of an especially heinous, atrocious, or cruel murder to one which involves only physical injury or torture prior to death or to physical injury alone in any event. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983).

That death is not instantaneous does not alone make a murder especially heinous, atrocious or cruel. *State v. Stanley*, 310 N.C. 332, 312 S.E.2d 393 (1984).

Evidence of a victim's begging for his life is, like torture, one factor for jury consideration in determining whether a murder is especially heinous, atrocious, or cruel. However, it is not necessarily a determinative factor. Nor does this factor alone always necessitate a finding that a murder was especially heinous, atrocious, or cruel. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983).

Evidence to be Considered in Light Most Favorable to State. — In determining whether the evidence is sufficient to support a finding of essential facts which would support a determination that a murder was especially heinous, atrocious, or cruel, the evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn therefrom. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986); *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, cert. denied, — U.S. —, 107 S. Ct. 241, 93 L. Ed. 2d 165 (1986).

Evidence Held Sufficient. — Evidence that defendant robbed Zip Mart convenience store and forced the clerk to accompany him in her car to a secluded area approximately five miles away, where she was shot six times, that victim's hands had been bound, and that the principal cause of death was a gunshot wound to the right central lower back, but that the victim may have lived as long as 15 minutes after being shot, although she would have gone into shock during the last phases of life and would have lost consciousness in the later stages of shock, was sufficient to support submission of the aggravating

factor that the murder was especially heinous, atrocious or cruel to the jury. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Evidence held sufficient for trial judge to find that victims endured psychological and physical suffering beyond that normally present in a second degree murder, and thus to find as an aggravating factor that the murders were especially heinous, atrocious, or cruel. *State v. Miller*, 316 N.C. 273, 341 S.E.2d 531 (1986).

Evidence clearly revealed that defendant's acts upon the victim were characterized by excessive brutality, physical pain and psychological suffering not normally present in a first-degree murder case. *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986).

Evidence of the nature of the fatal wounds inflicted and the victim's lingering death supported the jury's finding of the existence of the "especially heinous" circumstance. *State v. Stokes*, 319 N.C. 1, 352 S.E.2d 653 (1987).

Evidence Held Insufficient. — Where one wound was inflicted, to the jugular vein, and victim walked approximately 45 feet and collapsed, losing consciousness soon after the wound was inflicted, finding that murder was especially heinous, atrocious or cruel was not sufficiently supported by the evidence. *State v. Coleman*, 80 N.C. App. 271, 341 S.E.2d 750, cert. denied, 318 N.C. 285, 347 S.E.2d 466 (1986).

F. Course of Conduct.

Evidence Held Sufficient. — Where the State presented substantial evidence that after killing victim, defendant fired his weapon at another individual, intending to kill him, and the jury, by returning guilty verdicts, found beyond a reasonable doubt that defendant had committed this murder and assault, the trial court properly submitted the aggravating circumstance that the murder for which defendant stood convicted was part of a course of conduct in which defendant engaged and which included the commission by defendant of other crimes of violence against another person or persons to the jury for its consideration. *State v. Rogers*, 316 N.C. 203, 341 S.E.2d 713 (1986).

IV. MITIGATING CIRCUMSTANCES.

A. In General.

Definition, etc. —

In accord with original. See *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984), cert. denied, 471 U.S. 1030, 105 S. Ct. 2052, 85 L. Ed. 2d 324 (1985).

Admissibility Generally. —

In accord with original. See *State v. Boyd*, 311 N.C. 408, 319 S.E.2d 189 (1984), cert. denied, 471 U.S. 1030, 105 S. Ct. 2052, 85 L. Ed. 2d 324 (1985).

The trial judge's determination of whether a mitigating circumstance should be submitted to the sentencing jury should be guided by the following statement of the State Supreme Court in *State v. Pinch*, 306 N.C. 1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), reh. denied, 459 U.S. 1189, 103 S. Ct. 839, 74 L. Ed. 2d 1031 (1983): Common sense, fundamental fairness and judicial economy dictate that any reasonable doubt concerning the submission of a statutory or requested mitigating factor be resolved in the defendant's favor to ensure the accomplishment of complete justice at the first sentencing hearing. *State v. Stokes*, 308 N.C. 634, 304 S.E.2d 184 (1983).

Right to Peremptory Instruction. —

In accord with original. See *State v. Noland*, 312 N.C. 1, 320 S.E.2d 642 (1984), cert. denied, 469 U.S. 1230, 105 S. Ct. 1232, 84 L. Ed. 2d 369 (1985).

The trial court did not err in refusing to peremptorily instruct the jury under subdivision (f)(3) of this section that victim was a voluntary participant in defendant's homicidal act, where the State produced ample evidence to contradict defendant's claim that victim initially attacked him with a knife. *State v. Gladden*, 315 N.C. 398, 340 S.E.2d 673, cert. denied, — U.S. —, 107 S. Ct. 241, 93 L. Ed. 2d 165 (1986).

Rebuttal of Evidence of Mitigating Factors. — The prosecution is entitled to offer evidence designed to rebut mitigating circumstances only after defendant offers evidence in support of such mitigating factors. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

B. No Significant Prior Criminal Activity.

Prior criminal activity is not limited to prior convictions. *State v. Maynard*, 311 N.C. 1, 316 S.E.2d 197, cert. denied, 469 U.S. 963, 105 S. Ct. 363, 83 L. Ed. 2d 299 (1984); *State v.*

Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, — U.S. —, 107 S. Ct. 241, 93 L. Ed. 2d 165 (1986).

Submission of Mitigating Factor over Defendant's Objection. — The trial court did not commit prejudicial error by submitting to the jury, over his objection, the mitigating factor that defendant had no significant history of prior criminal activity, where despite evidence concerning his convictions on six counts of felony breaking or entering, six counts of felonious larceny, five counts of armed robbery, and one count of felonious assault in 1963 and 1965, defense counsel had strenuously argued that there was no evidence that defendant had committed any violent acts or violated any prison rules during the 18 years that he was incarcerated following such convictions, and where there was also evidence that defendant was only 20 years old when convicted of the 1965 offenses. *State v. Brown*, 315 N.C. 40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

E. Impaired Capacity.

But Properly Considered, etc. —

Under some circumstances, evidence of a defendant's intoxication at the time of the crime may properly be evaluated by the jury as a mitigating circumstance under subdivision (f)(6) of this section. *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986).

To What Degree of Intoxication Subdivision (f)(6) Applies. — When the defendant contends that his faculties were impaired by intoxication, such intoxication must be to such a degree that it affects defendant's ability to understand and control his actions before subdivision (f)(6) of this section is applicable. *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986).

F. Age of Defendant.

Chronological age of a defendant is not the determinative factor under subdivision (f)(7) of this section. Relevant to this inquiry is not only the chronological age of the defendant, but also his experience, criminal tendencies, and presumably the rehabilitative aspects of his character. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983).

The chronological age of a defendant is not the determinative factor under subdivision (f)(7) of this section. *State v.*

Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

Any hard and fast rule as to age would tend to defeat the ends of justice, so the term "youth" must be considered as relative and this factor weighed in the light of varying conditions and circumstances. It is well known that two young persons may vary greatly in mental and physical development, experience and criminal tendencies (citation omitted). One of these factors may have greater significance than the others in some cases, depending on the circumstances. *State v. Oliver*, 309 N.C. 326, 307 S.E.2d 304 (1983).

Largely conclusory statements that defendant was emotionally immature for his 23 years, made by foster parents with whom defendant lived from the time he was 16 until he was almost 18 years old, when balanced against defendant's chronological age, his apparently normal physical and intellectual development, and his level of experience, did not require the trial court to submit the mitigating circumstance listed at subdivision (f)(7) of this section. *State v. Johnson*, 317 N.C. 343, 346 S.E.2d 596 (1986).

§ 15A-2001. Capital offenses; plea of guilty.

Legal Periodicals. —

For note on jury discretion in capital cases in light of *State v. Pinch*, 306 N.C.

1, 292 S.E.2d 203, cert. denied, 459 U.S. 1056, 103 S. Ct. 474, 74 L. Ed. 2d 622 (1982), see 5 Camp. L. Rev. 451 (1983).

§ 15A-2002. Capital offenses; jury verdict and sentence.

Legal Periodicals. — For note on jury discretion in capital cases in light of *State v. Pinch*, 306 N.C. 1, 292 S.E.2d

203, cert. denied, 103 S. Ct. 474 (1982), see 5 Camp. L. Rev. 451 (1983).

CASE NOTES

The trial court has no power to overturn jury's sentencing recommendation. *State v. Brown*, 315 N.C.

40, 337 S.E.2d 808 (1985), cert. denied, — U.S. —, 106 S. Ct. 2293, 90 L. Ed. 2d 733 (1986).

Chapter 15B.

Editor's Note. — The legislation and annotations affecting Chapter 15B have been included in a recently published replacement chapter.

Chapter 17.

Habeas Corpus.

ARTICLE 1.

Constitutional Provisions.

§ 17-1. Remedy without delay for restraint of liberty.

Legal Periodicals. — For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

ARTICLE 8.

Habeas Corpus Ad Testificandum.

§ 17-41. Authority to issue the writ.

CASE NOTES

Applied in *State v. Rankin*, 312 N.C. 592, 324 S.E.2d 224 (1985).

§ 17-42. Contents of application.

CASE NOTES

Applied in *State v. Rankin*, 312 N.C. 592, 324 S.E.2d 224 (1985).

Chapter 17C.

North Carolina Criminal Justice Education and Training Standards Commission.

Sec.

17C-3. North Carolina Criminal Justice Education and Training Standards Commission es-

tablished; members; terms; vacancies.

§ 17C-1. Findings and policy.

Legal Periodicals. — For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

§ 17C-2. Definitions.

Local Modification. — Eastern Band of the Cherokee: 1987, c. 427, s. 4.

§ 17C-3. North Carolina Criminal Justice Education and Training Standards Commission established; members; terms; vacancies.

(b) The members shall be appointed for staggered terms. The initial appointments shall be made prior to September 1, 1983, and the appointees shall hold office until July 1 of the year in which their respective terms expire and until their successors are appointed and qualified as provided hereafter:

For the terms of one year: one member from subdivision (1) of subsection (a), serving as a police chief; three members from subdivision (2) of subsection (a), one serving as a police official, one serving as a police officer, and one serving as a company police officer; one member from subdivision (4) of subsection (a), appointed by the North Carolina Law-Enforcement Training Officers' Association; and two members from subdivision (5) of subsection (a), one appointed by the Governor and one appointed by the Attorney General.

For the terms of two years: one member from subdivision (1) of subsection (a), serving as a police chief; one member from subdivision (2) of subsection (a), serving as a police official; and two members from subdivision (4) of subsection (a), one appointed by the League of Municipalities and one appointed by the North Carolina Association of District Attorneys.

For the terms of three years: two members from subdivision (1) of subsection (a), one police chief appointed by the North Carolina Association of Chiefs of Police and one police chief appointed by the Governor; one member from subdivision (2) of subsection (a), serving as a police official; and three members from subdivision (4) of subsection (a), one appointed by the North Carolina Law-Enforcement Women's Association, one appointed by the North Carolina

Association of Criminal Justice Educators, and one appointed by the North State Law-Enforcement Officers' Association.

Thereafter, as the term of each member expires, his successor shall be appointed for a term of three years. Notwithstanding the appointments for a term of years, each member shall serve at the will of the appointing authority.

The Attorney General, the Secretary of the Department of Crime Control and Public Safety, the Secretary of the Department of Human Resources, the Secretary of the Department of Correction, the President of The University of North Carolina, the Director of the Institute of Government, and the President of the Department of Community Colleges shall be continuing members of the Commission during their tenure. These members of the Commission shall serve *ex officio* and shall perform their duties on the Commission in addition to the other duties of their offices. The *ex officio* members may elect to serve personally at any or all meetings of the Commission or may designate, in writing, one member of their respective office, department, university or agency to represent and vote for them on the Commission at all meetings the *ex officio* members are unable to attend.

Vacancies in the Commission occurring for any reason shall be filled, for the unexpired term, by the authority making the original appointment of the person causing the vacancy. (1971, c. 963, s. 3; 1977, c. 70, ss. 29, 30; 1979, c. 763, s. 1; 1981 (Reg. Sess., 1982), c. 1191, s. 31; 1983, c. 558, s. 3; c. 618, ss. 1, 2; c. 807, ss. 1, 2; 1987, c. 282, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1987 amendment, effective June 4, 1987, substituted "President of the

Department of Community Colleges" for "Director of Law-Enforcement Training of the Department of Community Colleges" in the first sentence of the next-to-last paragraph of subsection (b).

Chapter 17D.

North Carolina Justice Academy.

§ 17D-1. Definitions.

Legal Periodicals. — For survey of 1982 law relating to criminal law, see 61 N.C.L. Rev. 1060 (1983).

Chapter 17E.

North Carolina Sheriffs' Education and Training Standards Commission.

Sec.

17E-7. Required standards.

§ 17E-7. Required standards.

(c) In addition to the requirements of subsection (b) of this section, the Commission, by rules and regulations, may fix other qualifications for the employment and retention of law-enforcement officers including minimum age, education, physical and mental standards, citizenship, good moral character, experience, and such other matters as relate to the competence and reliability of persons to assume and discharge the responsibilities of the office, and the Commission shall prescribe the means for presenting evidence of fulfillment of these requirements.

Where minimum educational standards are not met, yet the individual shows potential and a willingness to achieve the standards by extra study, they may be waived by the Commission for the reasonable amount of time it will take to achieve the standards required. Upon petition from a sheriff, the Commission may grant a waiver of any provisions of this section (17E-7) for any justice officer serving that sheriff.

(1983, c. 558, s. 1; 1987, c. 783, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987

amendment, effective August 12, 1987, substituted "justice officer" for "deputy" in the second paragraph of subsection (c).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1987

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1987 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

LACY H. THORNBURG

Attorney General of North Carolina

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